78-873

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, IRVING ANKER, Chancellor of the City School District of the City of New York,

Petitioners,

-against-

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, HERMAN R. GOLDBERG, Associate Commissioner, Equal Educational Opportunity Programs, United States Department of Health, Education and Welfare,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
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The Opinion Below

The opinion delivered by the Court of Appeals for the Second Circuit upon the rendering of the decree sought to be reviewed has not been officially reported. It is attached hereto as Appendix I.

Jurisdiction

The decree sought to be reviewed was dated and entered on August 21, 1978.

By orders dated October 6, 1978 (attached hereto as Appendix II), petitioners' petition for a rehearing with a suggestion for a rehearing en banc was denied by the Court of Appeals.

This Court has jurisdiction to review the decree in question by writ of certiorari pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether this Court's conclusion in Regents of the University of California v. Bakke, ___U.S.___, 46 U.S.L.W. 4896 (1978), that Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d et seq. requires a finding of discrimination to be based upon evidence of conduct violating the constitutional intent standard applies to the Emergency School Aid Act ("ESAA"), 20 U.S.C. 1601 et seq.?

2. Did the Court of Appeals for the Second Circuit err in holding in this case that the Department of Health, Education and Welfare ("HEW") may reject

a school district's application for ESAA funding solely upon the basis of a finding of disparate racial impact and without a finding under the constitutional intent standard that the school district has purposefully and intentionally discriminated against any group on the basis of race?

3. Has HEW overstepped the limits of its administrative power by imposing a standard of review which is so burdensome as to be virtually unchangeable in the courts?

Relevant Constitutional and Statutory Provisions

The Fourteenth Amendment to the Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Emergency School Aid Act, 42 U.S.C. § 1601:

> (a) The Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional

> funds to which local educational agencies do not have access.
>
> (b) The purpose of this chapter is to provide financial assistance -
>
> (1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;
>
> (2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and
>
> (3) to aid school children in overcoming the educational disadvantages of minority group isolation.

Emergency Schoool Aid Act, 20 U.S.C. §1602:

> (a) It is the policy of the United States that guide-

lines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

(b) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d:

> No person in the United United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Elementary and Secondary Education Amendments of 1966, §182, 42 U.S.C. §2000d-5:

> The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given

the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: Provided, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned.

Elementary and Secondary Education Amendments of 1970, 42 U.S.C. §2000d-6

(a) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the

schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

(b) Such uniformity refers to one policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

(c) Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally-assisted programs and activities as required by title VI of the Civil Rights Act of 1964.

(d) It is the sense of the Congress that the Department of Justice and the Department of Health, Education, and Welfare should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States.

Preliminary Statement

This Court is presented with the opportunity to consider the application of

its decision in Regents of the University of California v. Bakke, supra, with respect to the test of discrimination to be used under Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d et seq. in a controversy involving local eligibility for a federally funded program. In Bakke, a majority of this Court concluded that a violation of Title VI must be established by evidence of constitutionally proscribed conduct, i.e., intentional or purposeful discrimination. The Court of Appeals in upholding HEW's denial of funding to petitioners under the Emergency School Aid Act ("ESAA"), 20 U.S.C. §1601 et seq., ignored the effect of Bakke on Title VI's eligibility standards for federally funded programs such as ESAA. Instead, the Court of Appeals cited, inter alia, pre-Bakke interpretations of Title VI eligibility standrads as set forth in

Lau v. Nichols, 414 U.S. 563 (1974), which are of doubtful validity, in concluding that the disparate racial impact test rather than the constitutionally mandated standard of intentional and purposeful discrimination suffices to establish a violation of Title VI and consequently ESAA. Also presented is the issue of Title VI's role as the means for guarding against racial discrimination in federally funded programs and the underlying issue of excessive or unfettered overreaching and interference by HEW with a local educational agency in a manner which effectively precludes any review of these administrative decisions by the judiciary.

Title VI of the 1964 Civil Rights Act, is intended to provide the enforcement power to insure that no discrimination exists in programs which receive federal financial assistance.

The Emergency School Aid Act authorizes a federal grant system to school districts throughout the country to aid these districts in developing programs to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools.

Petitioners contend that ESAA is one of the federal financial assistance statutes which Title VI was designed to enforce. This interpretation is based upon a fair reading of the statutory language of ESAA, upon the available case law and upon logic.

Statement of the Case

In April, 1977, the Board of Education of the City of New York ("the Board") on behalf of itself and several local community school districts submitted an application to HEW for 1977-78 ESAA funding to adminster

programs designed to foster integration and reduce minority student isolation for approximately 40,000 students in elementary and secondary schools in the New York City School District.

Prior to July 1, 1977 the Board was advised by HEW that its application met the minimum qualifications for ESAA funding and that $3.5* million had been earmarked as its share of the 1977-78 appropriation.

However, on July 1, 1977, Defendant Goldberg of HEW notified the Board that its application was denied. Statistics developed

* The total amount of funds earmarked was $17.5 million. This included the allocation for the local community school boards ("CSB's") in New York City. Approximately $14.0 million was released to the CSB's and thus they are not parties to this action. Only the applications of the Central Board and CSB 11 remained outstanding. After the Court of Appeals' decision in this case, CSB 11 resolved its dispute with HEW thus leaving the Board as the only plaintiff.

by the Office of Civil Rights of HEW in a civil rights compliance investigation of the New York City School District, conducted pursuant to Title VI of the 1964 Civil Rights Act, allegedly demonstrated that teacher assignments in some elementary and junior high schools operated by local community school boards and in some high schools operated by the City Board resulted in their racial identifiability. Upon notification of ineligibility, the Board and individual community school board applicants participated in "show cause proceedings" pursuant to 45 C.F.R. §185.46. At these proceedings defendant Goldberg ruled that he would limit the agency's inquiry to the accuracy of the statistics upon which HEW made its determination to deny ESAA funding to the various school boards. Thereafter, defend-

ant Goldberg issued an opinion adhering to the July 1, 1977 decision.

The underlying action was commenced in September, 1977 in the District Court for the Eastern District of New York (WEINSTEIN, J.). The Board sought to permanently enjoin defendants from enforcing their determination of July 1, 1977 that it was ineligible for ESAA funding because of alleged discrimination in teacher assignments resulting in racially identifiable schools in violation of 20 U.S.C. §1605 and 45 C.F.R. §185.43(b) (2).

On November 18, 1977 the District Court granted plaintiffs' application for a stay preserving the $3.5 million ESAA fund.*

*ESAA funds in the amount of $3.5 million were earmarked for the Board, while $300,000 was set aside for CSB 11.

On cross-motions for summary judgment and re-argument, the District Court granted judgment for the Board and CSB 11 and remanded their ESAA applications to defendants for de novo consideration consistent with the principles of due process discussed in its opinion.

The opinion rejected defendants' interpretation that, under ESAA, school districts experiencing statistical racial imbalance were ineligible for funding. Instead, the District Court held that under ESAA "discrimination" means de jure or intentional discrimination and that defendants should have considered proof offered by the Board rebutting defendants statistical showing of ethnic disparity. (A copy of the District Court decision is annexed hereto as Appendix III.)

At the de novo proceeding ordered by the District Court, plaintiffs submitted to defendants proof that the current minority and non-minority teacher incidence and distribution resulted from and was affected by State law; demographic changes in the student population of the City schools; neutral date-of-hire seniority practices emanating from collective bargaining agreements; minority representation in the relevant available work force; and incidence and distribution of vacancies in specific teacher license areas.

On March 22, 1978, after the de novo review, defendants again found the Board ineligible for ESAA funding. The Board then moved in the District Court for a preliminary injunction against enforcement of that administrative decision. The District Court consolidated the preliminary

injunction application with trial of the action and rendered final judgment sustaining defendants' denial of ESAA funding for the Board on the basis that the HEW determination was predicated on substantial evidence.

Plaintiffs then applied to the Court of Appeals for the Second Circuit for a stay of the disbursement of the $3.5 million fund pending appellate review. On April 28, 1978, the motion was granted.

In the Court of Appeals, the Board argued that Judge Weinstein was in error in finding that substantial evidence supported HEW's determination that the Board had engaged in discrimination in violation of the constitution, i.e., intentional discrimination. The Court of Appeals (OAKES, BLUMENFELD and MEHRTENS, J.J.), held, however, that it was unnecessary to determine "whether

the evidence supports a finding of purposeful segregative intent." Slip Opinion at 4537. Instead, Judge Oakes, writing for the court, affirmed the result reached by the District Court on the grounds that the evidence supported a finding of discrimination under the disparate racial impact or effects test:

> Here [ESAA], Congress intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an unjustified disparity in staff assignments.

Slip Opinion at 4539.

On September 5, 1978, petitioners filed a petition for a rehearing with a suggestion for a rehearing en banc. This automatically stayed the issuance of the court's mandate thereby preserving the $3.5 million fund earmarked for the Board. The petition was denied on

October 6, 1978. On October 26 1978, petitioners motioned the Court of Appeals for a stay of the issuance of its mandate pending application to this Court for a writ of certiorari. The motion was granted on October 31, 1978, and thus the $3.5 million fund remains intact pending review by this Court.

Argument

In finding that the disparate racial impact test rather than the constitutional intent standard is applicable to determinations of ineligibility for ESAA funding, the Court of Appeals reasoned that constitutional standards need only be applied when a violation of the Fourteenth Amendment is in issue. Here, the court found the relevant inquiry concerned only a Congressional enactment which validly incorporated a stricter standard, "more protective of minority rights, than constitutional minimums required". Slip Opinion at 4537. The court reasoned that the language of ESAA itself, 20 U.S.C.

§ 1602(a), that "guidelines and criteria be applied uniformly... without regard to the origin of ... discrimination," compelled the interpretation that the stricter disparate impact standard applies. Slip Opinion at 4539.

The Court of Appeals then found that since a violation of Title VI will constitute a violation of ESAA, citing 20 U.S.C. § 1602(b),* and since, according

*20 U.S.C. § 1602(b) provides that the "guidelines and criteria of Title VI "be applied uniformly... without regard to the origin of ... discrimination".

to Judge Oakes, Title VI incorporates the disparate racial impact standard, this weighty burden is applicable to ESAA applicants as well. Slip Opinion at 4539.

While petitioners agree with the Court of Appeals that ESAA ineligibility is predicated on the same standard used to determine whether a Title VI violation exists, petitioners respectfully assert that the Court of Appeals erred in concluding that the disparate racial impact test applies to a determination of violations under Title VI and, consequently, ineligibility for ESAA funding. Petitioners

further assert that the Court of Appeals' reliance on this Court's decision in Lau v. Nichols, supra, as supportive of the applicability of the disparate racial impact test under Title VI and ESAA, is incorrect in light of the clear dilution of that decision by this Court's recent pronouncements in Regents of the University of California v. Bakke, supra. See, also, Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S.252(1977); Washington v. Davis, 426 U.S. 229 (1976); Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973). Petitioners contend that the Court of Appeals erred in

failing to find that evidence of purposeful or intentional discrimination is the necessary predicate for a finding of a Title VI violation and ESAA ineligibility.

(1)

Title VI was enacted in order "to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution". Regents of the University of California v. Bakke, supra, 46 U.S.L.W. at 4900 (Powell, J.). In essence, Title VI was designed to police federal funding programs in order to insure that local agencies

and institutions do not use the federal largess to finance racially discriminatory programs.

Nowhere is Title VI's enforcement role more evident than in federal programs designed to fund local educational agencies. The 1966 Amendment*, to the Elementary and Secondary Education Act of 1965, the enactment that provides the City of New York with more than one-half of all its federal reimbursement funding, was actually codified as an addition to Title VI (i.e., 42 U.S.C. § 2000d-5). Section 182 concerns the application of various proce-

*P.L. 89-750 § 182, 80 Stat. 1209

dural rights to local educational agencies found to be in violation of Title VI and thus threatened with a denial of funding under this major program. Similarly, the 1970 Amendment* to the Elementary and Secondary Education Act of 1965, which sets forth the policy of applying Title VI in the context of this program, was also codified as an addition to Title VI (i.e., 42 U.S.C. § 2000d-6). It is thus inescapable that funding under Congress' major educational funding program is directly tied to the standards and criteria of Title VI.

*P.L. 91-230 § 2, 84 Stat. 121.

ESAA is cut from the same mold. 20 U.S.C. § 1602(b), which is apparently derived from 42 U.S.C. § 2000d-6, provides:

> It is the policy of the United States that guidelines and criteria established pursuant to Title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.*

*As set forth above, section 182 of the Elementary and Secondary Education Amendments of 1966 are codified as an addition to Title VI, 42 U.S.C. § 2000d-5.

Thus, just as the Elementary and Secondary Education Act of 1965, as amended, is intended to comply with the mandate of Title VI, so to is ESAA intended to promote the policies of non-discrimination enunciated in the 1964 Civil Rights Act.*

Indeed, the link between Title VI and ESAA was recognized by the Court of Appeals:

> Moreover, the ESAA proscription against employment discrimination forbade discriminatory acts and

* Significantly, whereas the Elementary and Secondary Education Act of 1965, as amended, provides the New York City public School system with more than 50% of all its yearly federal reimbursement funding, allocations under ESAA amount to less than 5% of reimbursement funds.

> practices which violate statutory civil rights provisions such as Title VI of the Civil Rights Act of 1964.

Slip Opinion at 4539. Thus, an express purpose of ESAA, as set forth in 20 U.S.C. § 1602(b), and recognized by the Court of Appeals, is to promote the policies of non-discrimination enunciated in Title VI of the Civil Rights Act of 1964. As a consequence, the test for racial discrimination contained in Title VI (as set forth in Bakke) applies to eligibility for ESAA funding as well.

Until this Court's recent landmark decision in Regents of the University of California v. Bakke,

supra, the test for determining racial discrimination under Title VI appeared to be the disparate impact test. Lau v. Nichols, 414 U.S. 563 (1974). That is, even without evidence of purposeful and intentional discrimination, where statistical evidence reveals that policies or programs have an adverse effect on a particular racial group, that will be sufficient to support a prima facie finding of racial discrimination under Title VI. This approach was radically altered, however, by this Court's decision in Bakke. Bakke establishes that the constitutional or purposeful intent standard is the correct standard for determining whether

discrimination in violation of Title VI has taken place. In Bakke, Justice Powell remarked:

> ...Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

46 U.S.L.W. at 4901. Similarly, in an opinion in which Justices White, Marshall and Blackmun joined, Justice Brennan stated:

> In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies.

46 U.S.L.W. at 4912. Justice Brennan went on to reiterate this interpreta-

tion of Title VI and in the process to cast grave doubt on the continued viability of Lau v. Nichols, supra:

> However, even accepting Lau's implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent in the least.

46 U.S.L.W. at 4918 (emphasis added). See also, 46 U.S.L.W. at 4927 (opinion of Justice White) and 46 U.S.L.W. at 4931 (opinion of Justice Blackmun).

Thus, notwithstanding whatever standards courts have applied to Title VI analysis in the

past, a majority of this Court in Bakke have established that Title VI's standards for determining racial discrimination are coextensive with constitutional standards.*

*Reference to the remarks of Senator Humphrey, a strong proponent of the 1964 Civil Rights Act, supports this construction of Title VI:

> The existing law of the land is stated in section 601 [42 U.S.C. § 2000d] Section 602 [42 U.S.C. § 2000d-2] of H.R. 7152 do not represent an extension of that law. Those latter sections represent no new power.

110 Cong. Record 5254 (1964). Senator Humphrey later added:

> No new rights are granted here [§§ 601, 602] nor are any taken away; but here we have a prescribed means of enforcing these rights.

Id. 5255

Inexplicably, however, the Court of Appeals totally ignored Bakke in its discussion of Title VI.*

By failing to consider this Court's construction of Title VI as set forth in Bakke, the Court of Appeals' reasoning was fatally defective. For if, as the court stated, the Title VI standard of racial discrimination is "significant" in

*Yet, it is interesting to note that the Court of Appeals specifically cited Bakke's apparent approval of a disparate impact test under Title VII of the 1964 Civil Rights Act.

construing the correct standard for determining eligibility under ESAA, it is significant that the court failed to consider Bakke's effect on the Title VI. Slip Opinion at 4538-4539.

(2)

By failing to take account of Bakke in relying on Title VI as a basis for concluding that ESAA incorporates the disparate racial impact test, the Court of Appeals avoided the essential inquiry of whether ESAA contains a separate and distinct standard from

Title VI that would justify a denial of ESAA funding where there is only a disparate racial impact. For it is clear that after Bakke, application of Title VI standards to review of eligibility for ESAA funding requires that constitutionally prohibited conduct be demonstrated before ESAA ineligibility may be established. The Court of Appeals failed to directly decide the question of separate eligibility standards under ESAA since it held, notwithstanding Bakke, that both ESAA and Title VI employ the disparate racial impact standard.

In order to resolve this issue, it is essential to recognize that interpreting 20 U.S.C. §1602(a) as incorporating the disparate racial impact test, as did the Court of Appeals, makes 20 U.S.C. §1602(b), which incorporates the post-Bakke Title VI constitutional intent standard, superfluous. That is, the more stringent disparate impact test necessarily incorporates the less stringent constitutional intent test and thus obviates the need for the more liberal standard. It is well established that construing a statutory provision as superfluous is contrary to recognized rules of statutory construction and thus invalid. Cf. United States v. Menasche, 348 U.S. 528, 538-539 (1955); Zeigler Coal Co. v. Kleppe, 536 F. 2d 398 (D.C. Cir. 1976).

Instead, petitioners submit that ESAA's standards for determining eligibility for funding are absolutely and exclusively coextensive with the standards for determining racial discrimination under Title VI. At least two Federal Court decisions support this conclusion, Bradley v. Milliken, 432 F. Supp. 885 (E.D. Mich. 1977); Robinson v. Vollert, 411 F. Supp. 461(S.D. Tex. 1976). It was held in Bradley that:

> ESAA does not enhance HEW's power to apply eligibility criteria above and beyond Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

461 F. Supp. at 866. In so holding, the Bradley Court relied on Robinson where the issue was whether ESAA

permitted HEW to review the sufficiency of a federal court desegregation order in determining whether ESAA's eligibility requirements had been met. After a review of ESAA's legislative history in a futile attempt to identify the relevant Congressional intent, the court turned to Title VI for guidance. Title VI, the Robinson court found, is "intimately related" to ESAA and therefore the rule under Title VI would apply to ESAA as well. Robinson v. Vollert, supra, 411 F. Supp.

at 475. The court made no intimation that ESAA might contain some basis, independent of Title VI, that would justify a result different from that mandated by the 1964 Civil Rights Act. Accordingly, in Robinson, Title VI's recognized proscription of administrative review of the sufficiency of federal court desegration

orders was applied to ESAA.*

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* Quoting from Stribling v. United States, 419 F. 2d 1350, 1352-53 (8th Cir. 1969), the Robinson court remarked:

> '...where the interpretation of a particular statute at issue is in doubt, the express language and legislative construction of another statute not strictly in pari materia but employing similar persons, things or cognate relationships may control by force of analogy.'

Robinson v. Vollert, supra, 411 F. Supp. at 475 n. 31. See, Overstree v. North Shore Corp., 318 U.S. 125, 131-132 (1943).

No other federal courts have so closely scrutinized the relationship between ESAA and Title VI. Accordingly, it is respectfully submitted that the reasoning in Bradley and Robinson should be given considerable weight by this Court in reviewing petitioners' argument that the correct and sole eligibility standard for ESAA funding must be found in Title VI. And, as stated above, this Court's decision in Regents of the University of California v. Bakke, requires that the constitutional intent test is the applicable standard under Title VI, and thus ESAA as well.

(3)

Underlying the present controversy between the City of New York and HEW is the serious question of the relationship between this major federal administrative agency and local school authorities. HEW is of the view that disparate racial impact per se constitutes ineligibility for ESAA funding; the ESAA applicant's justifications for the racial statistics are irrelevant. The Court of Appeals in this case has apparently taken a less extreme position in that it considered the Board's justifications for the challenged teacher assignments, although finding them to be inadequate to rebut the prima facie showing of discrimination. However, the net effect of the Second Circuit's decision is to require a local educational agency to meet a

virtually insurmountable burden in justifying a statistical showing of disparate racial effect. As a result, HEW's authority to interfere with the local educational process is greatly enhanced. And concommitantly, adoption of its disparate racial impact test significantly dilutes the judicial power to review administrative decisions.

Indeed, District Court Judge Jack B. Weinstein, in a pending related case arising out of HEW's decision to deny the Board's 1978-79 application for ESAA funding,* evidenced concern over the practical effect of the Court of Appeals ruling in this case:

*Board of Education, et al. v. Califano, et al. 78C2135(E.D.N.Y). Judge Weinstein has entered an injunction in that case maintaining the fund earmarked for the Board and has remanded the Board's application to HEW to determine if the Board is entitled to a waiver of ineligibility under 20 U.S.C. §1605.

> The net result of these two* cases is to make practically unreviewable any insistence by HEW directed to a unit such as the Board of Education of the City of New York to changes being made in its practices with respect to assignment of teachers.
>
> Under these circumstances, practically, the City has no alternative but to "voluntarily" agree to any conclusions and demands of HEW. Again, this may be a perfectly sound position and this Court has no objection to it, but the combined implications with respect to a shift of power from the Courts to HEW and from local education authorities (to) the national education authorities, is so grave as to warrant full consideration by the appellate courts of this nation.

Board of Education v. Califano, No. 78C 2135 (E.D.N.Y.) transcript of September 28, 1978 proceedings on plaintiff's motion for

*Judge Weinstein is referring here to the Court of Appeals decision in the instant case and Caulfield v. Board of Education, No. 78C 6035 (2d Cir., September 5, 1978) (attached hereto as Appendix IV.) Caulfield held that an agreement reached between HEW and the Board to resolve the Title VI violation letter which provided the underlying data upon which the Board's ESAA application was denied, was not voluntary and, therefore, was void.

a temporary restraining order at p. 10 (attached hereto as Appendix V).

In conclusion, this case presents the Court with the opportunity to clarify, in light of Bakke, Title VI's enforcement role and applicability to a federally funded program designed to eliminate the effects of racial discrimination. Also presented is the opportunity to determine whether the effects of the Court of Appeals' decision, as articulated above by Judge Weinstein, are in accord with this Court's notion of federalism and the role of the judiciary in resolving disputes between the federal bureaucracy and local agencies.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1121, 1414—September Term, 1977.

(Argued May 26, 1978 Decided August 21, 1978.)

Docket Nos. 78-6083, 78-6088

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK *et al.*,

Appellants,

v.

JOSEPH A. CALIFANO, JR., SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE *et al.*,

Appellees.

Before:

OAKES, *Circuit Judge,* and BLUMENFELD* and MEHRTENS,** *District Judges.*

Appeals from orders of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* affirming Department of Health, Education and Welfare's denial of grant applications for Emergency School Aid Act funds.

Affirmed.

* Of the District of Connecticut, sitting by designation.

** Of the Southern District of Florida, sitting by designation.

ROSEMARY CARROLL, Assistant Corporation Counsel (Allen G. Schwartz, Corporation Counsel of the City of New York, Leonard Koerner, Assistant Corporation Counsel, of counsel), *for Appellants.*

RICHARD B. CARO, Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York, Harvey M. Stone, Rodger C. Field, Assistant United States Attorneys, of counsel), *for Appellees.*

OAKES, *Circuit Judge:*

Consolidated appeals raise the important question whether in passing upon applications for grants of Emergency School Aid Act (ESAA)[1] funds the Department of Health, Education and Welfare (HEW) must apply a constitutional standard of intentional discrimination as delineated by the Supreme Court[2] or whether the ESAA as

1 20 U.S.C. §§ 1601-19.

2 *Dayton Bd. of Educ.* v. *Brinkman,* 433 U.S. 406, 413 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 268-69 (1977); *Washington* v. *Davis,* 426 U.S. 229, 242 (1976); *Keyes* v. *School Dist. Number One,* 413 U.S. 189, 201-03 (1973). These cases, interpreting the Fourteenth Amendment, hold that a "finding that the pupil population in the various [city, town or village] schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board." *Dayton Bd. of Educ.* v. *Brinkman, supra,* 433 U.S. at 413. Six members of the Supreme Court appear to be on record that this involves "[f]indings as to the motivations of multi-membered public bodies . . . ." *Id.* at 414. A seventh, Mr. Justice Stevens, while agreeing with this broad proposition, has expressed the qualification that such a finding "necessarily depends primarily on objective evidence concerning the effect of the Board's action, rather than the subjective motivation of one or more members of the Board . . . ." *Id.* at 421 (Stevens, *J.*, con-

supplemented by HEW regulations permits application of a disproportionate impact standard of discrimination. Appellants are respectively the Board of Education of the City School District of the City of New York (the Central Board) and the Community School Board (CSB) of Community School District 11 (District 11).

The two school boards sued to enjoin HEW from holding them ineligible for ESAA assistance. The United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, initially upheld HEW's denial of ESAA funds. But upon the Central Board's motion for reargument, the district court vacated its prior decision and remanded the matter to HEW for "further consideration" to determine if the school boards' disqualification resulted from unconstitutional discrimination as well as from violations of the applicable regulations. After remand the district court affirmed HEW's conclusion that substantial evidence warranted a finding of both unconstitutional discrimination and discrimination in violation of the ESAA. Accordingly, it entered a final order granting judgment in favor of HEW. We affirm the judgment on the basis that the standards of the statute and regulation have been satisfied.

I. *Statutory Scheme*

On an annual basis, the ESAA provides special assistance to local educational agencies and other eligible organizations to achieve three basic statutory objectives:

curring); *see Washington* v. *Davis*, *supra*, 426 U.S. at 253-54 (Stevens, J., concurring). For an exhaustive discussion of impact and motive, *see* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. Rev. 36, 42-50, 99-105 (1977). *See also Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir.), *petition for cert. filed*, 47 U.S.L.W. 3010 (U.S. July 18, 1978).

(1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;

(2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and

(3) to aid school children in overcoming the educational disadvantages of minority group isolation.

20 U.S.C. § 1601(b). Thus, the ESAA is a program purposefully designed "to aid in desegregating schools and support quality integrated schools." [3]

3 S. Rep. No. 604, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 2595, 2600. Funds granted under the ESAA are apportioned on a numerical basis, on "the relative number of minority group children enrolled in the elementary and secondary schools of each State . . . ." *Id.* at 2601. An important congressional objective, incorporated in the statute itself, is "the elimination of minority group isolation to the maximum extent possible" in all the schools of a given district, *id.*, thereby seeking with federal funding to carry out the longstanding commands of *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954) (segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives minority children of equal educational opportunities).

The House-Senate Conference Committee reported:

> *Purpose.*—The House amendment stated the purpose of the title as providing *financial assistance to meet the special needs incident to desegregation* and *to encourage voluntary integration*. The Senate amendment stated the purpose as encouraging comprehensive planning for the elimination of minority group isolation, as providing financial assistance to establish stable, quality, integrated schools, as assisting in eliminating minority group isolation, and as aiding schoolchildren in overcoming the educational disadvantages of minority group isolation. The conference substitute retains the House provision with the one addition of the Senate reference *to aiding schoolchildren in overcoming the educational disadvantages of minority group isolation.*

Each year that an application for ESAA assistance is submitted, the application is evaluated and the eligibility of the applicant reviewed. ESAA funds are awarded to qualified applicants in the order in which their applications are ranked. The ranking depends on compliance with specified guidelines and criteria, the most important being "objective" in nature. 45 C.F.R. § 185.14(a), (b) & (c).[4]

Policy with respect to the application of certain provisions of federal law.—The House amendment stated the policy of the United States that guidelines and criteria established pursuant to this title *shall be applied uniformly in all regions of the United States* in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation. The Senate amendment stated the policy of the United States that guidelines and criteria established pursuant to Title VI of the Civil Rights Act, section 182 of the Elementary and Secondary Education Amendments of 1966, and this title *shall be applied uniformly in all regions of the United States* in dealing with conditions of segregation by race *whether de jure or de facto* in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation. The conference substitute retains both the Senate and House provisions but deletes the reference in the Senate amendment to this title. The conference substitute's version of the Senate provision, therefore, restates the policy contained in section 2(a) of Public Law 91-230 and in no way supercedes [*sic*] subsection (b) of such section.

Conf. Rep. No. 798, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. Code Cong. Ad. & News 2608, 2662-63 (emphasis added). Thus, superimposed upon the underlying purposes of the ESAA is a requirement of uniform application throughout the country, irrespective of the origin or cause of segregation. This is expressed in 20 U.S.C. § 1602(a) as follows:

> It is the policy of the United States that guidelines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

4 Eighty "points are awarded on the basis of 'objective criteria,' as follows: 30 points on the basis of "need" as determined by the number and percentage of minority group children in the applicant's schools

The ESAA program is competitive in nature since the amount appropriated by Congress is less than the total amount of the grants sought; only those applications which meet ESAA objectives to the greatest extent possible are the ones which receive the awards. *Id.* § 185.14(c)(4).

In addition to filing applications which are timely[5] and which meet the minimal technical/qualitative criteria, *see* 20 U.S.C. §§ 1605(a), 1606-09;[6] 45 C.F.R. § 185.14,[7] the applicant must establish that it has not engaged in any of the four disqualifying acts, practices, policies or procedures condemned by the statutes and regulations. 20 U.S.C. § 1605(d)(1);[8] 45 C.F.R. § 185.13(*l*).[9] The Assistant

as compared to other school districts in the state; 50 points on the basis of "the effective net reduction in minority group isolation" (in terms of the number and percentage of children affected) or, in the case of certain types of assistance applications, the "effective net prevention of minority group isolation." 45 C.F.R. § 185.14(a) (1977). In addition to points awarded for objective criteria, 45 "points" are awarded on the basis of (1) "needs assessment," (2) "statement of objectives," (3) "activities" (including specificity of project design, staffing, delivery of services, and parent and community involvement), (4) "resource management" and (5) "evaluation." The point awards are determined by the Assistant Secretary who is authorized to seek expert assistance. *Id.* § 185.14(b). Criteria for funding include (1) program cost and (2) amount of funds available for assistance within the state in relation to other pending state applications. *Id.* § 185.14(c)(1). Fewer than 40 points under § 185.14(a) or 28 points under § 185.14(b) result in automatic denial (subject to resubmission). *Id.* § 185.14(c)(2) & (3). Section 185.14(c)(4) and (5) establish the procedures for award of funds on the basis of application rank.

5 The Assistant Secretary specifies the times by which applications must be filed, 20 U.S.C. § 1609(e).

6 Some of the criteria are set forth in note 4 *supra.*

7 *See* note 4 *supra.*

8 20 U.S.C. § 1605(d)(1) provides:

> No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—
>
> (A) transferred (directly or indirectly by gift, lease, loan, sale, or other means) real or personal property to, or made any ser-

(footnote 9 appears on page 4522)

Secretary for Education may not approve the application unless it is determined by the Secretary that the applicant

vices available to, any transferee which it knew or reasonably should have known to be a nonpublic school or school system (or any organization controlling, or intending to establish, such a school or school system) without prior determination that such nonpublic school or school system (i) is not operated on a racially segregated basis as an alternative for children seeking to avoid attendance in desegregated public schools, and (ii) does not otherwise practice, or permit to be practiced, discrimination on the basis of race, color, or national origin in the operations of any school activity;

(B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, *or otherwise engaged in discrimination based upon race*, color, or national origin *in the hiring, promotion, or assignment of employees of the agency* (or other personnel for whom the agency has any administrative responsibility);

(C) in conjunction with desegregation or the conduct of an activity described in this section, had in effect any procedure for the assignment of children to or within classes which results in the separation of minority group from nonminority group children for a substantial portion of the school day, except that this clause does not prohibit the use of bona fide ability grouping by a local educational agency as a standard pedagogical practice; or

(D) had in effect any other practice, policy, or procedure, such as limiting curricular or extracurricular activities (or participation therein by children) in order to avoid the participation of minority group children in such activities, which discriminates among children on the basis of race, color, or national origin;

except that, in the case of any local educational agency which is ineligible for assistance by reason of clause (A), (B), (C), or (D), such agency may make application for a waiver of ineligibility, which application shall specify the reason for its ineligibility, contain such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission of the application.

(Emphasis added.)

is not ineligible. *See* 20 U.S.C. § 1605(d)(4).[10] While the statute itself forbids discrimination in the hiring, promotion or assignment of teachers, note 8 *supra*, the pertinent regulation in this case is 45 C.F.R. § 185.43(b)(2).[11] In

9 Section 185.13 provides in pertinent part:

Such application shall contain . . .

. . . .

(2)(i) An assurance that the applicant has not had or maintained in effect prior to the date of its application for assistance under the Act, and will not have or maintain in effect subsequent to such date, any practice, policy, or procedure with respect to minority group personnel in violation of § 185.43(b) (or that if such a violation has occurred, application for a waiver of ineligibility has been made to the Secretary); and (ii) a statement of the number of principals, full-time classroom teachers, and athletics head coaches, by race, for the academic year immediately preceding *(a)* the year in which the applicant first implemented any portion of a plan for desegregation or for elimination or reduction of minority group isolation in its schools pursuant to an order of a Federal or State court or administrative agency, or *(b)* the year in which the applicant first implemented any portion of a plan or project described in § 185.11, whichever is earlier, and of the number of principals, full-time classroom teachers, and athletics head coaches, by race, as of the date of its application;

(3)(i) An assurance that the applicant has not had or maintained in effect prior to the date of its application for assistance under the Act, and will not have or maintain in effect subsequent to such date, any procedure for assignment of children to classes in violation of § 185.43(c) (or that if such a violation has occurred, application for a waiver of ineligibility has been made to the Secretary); and (ii) a statement of the total number of children assigned by the applicant as of the date of the application to all-minority or all-nonminority classes for more than 25 percent of the school day classroom periods, with an educational justification or explanation for any such assignments[.]

. . . .

10 20 U.S.C. § 1605(d)(4) provides:

No application for assistance under this chapter shall be approved prior to a determination by the Secretary that the applicant is not ineligible by reason of this subsection.

11 45 C.F.R. § 185.43(b)(2) provides:

No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect

substance, the regulation makes ineligible for assistance an educational agency which after June 23, 1972, has utilized a procedure resulting, *inter alia*, in the discriminatory "assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin." [12]

II. *Underlying Facts*

Teaching and supervisory appointments to public schools in New York City are now and have traditionally been made by the Chancellor of the Central Board. High school teachers are appointed by the Chancellor from a list of eligible candidates.[13] The list of eligible candidates is prepared by the Board of Examiners, which ranks each candidate on the basis of a competitive examination.[14]

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any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility) . . . .

12 *Id.* Only the Secretary of HEW himself may grant waivers of the disqualifying practices. *See* 20 U.S.C. § 1605(d)(1), (2) & (3).

13 (a) The chancellor shall appoint and assign teachers for all schools and programs under the jurisdiction of the city board from persons on competitive eligible lists.

(b) The chancellor shall appoint and assign all supervisory personnel for all schools and programs under the jurisdiction of the city board from persons on qualifying eligible lists.

(c) Each community board shall appoint teachers for all schools and programs under its jurisdiction who are assigned to the district by the chancellor from competitive eligible lists. Insofar as practicable the chancellor, when making such assignments shall give effect to the requests for assignment of specific persons by the community board. The community board shall appoint such teachers to schools within such district within thirty days if such appointment is to be effective on a date subsequent thereto and within three days if such appointment is to become effective immediately. . . .

N.Y. Educ. Law § 2590-j(4)(a)-(c) (McKinney 1970).

14 3.(a)(1) The board of examiners shall prepare and administer objective examinations to determine the merit and fitness of all candidates for teaching and supervisory service positions, other than the positions of chancellor, executive deputy city superintendent, deputy city superintendent, assistant city superintendent and community superintendent. Examinations for teaching positions may consist in part of the National Teachers Examination administered by the Educational Testing Service of Princeton, New Jersey.

. . . .

(b)(1) Examinations for teaching positions shall be open competitive.

(2) Examinations for all supervisory service positions shall be open qualifying.

(3) The board of examiners may establish an eligible list for any class of positions for which it finds inadequate numbers of qualified persons available for recruitment. Such examination shall, so far as practicable, be constructed and rated so as to be equivalent. Candidates who pass any such examination and who are otherwise qualified shall be placed on such list in the rank corresponding to their grade. . . .

(c) All lists of eligibles for supervisory or administrative positions which are in existence and which were placed in abeyance, and appointments from which were prohibited by a temporary restraining order of the United States District Court on the twenty-third day of July nineteen hundred seventy-one, or the preliminary injunction of the said court dated September seventeenth, nineteen hundred seventy-one, continuing such prohibition, and of which lists those that are scheduled to expire prior to March first, nineteen hundred seventy-five shall be deemed extended to March first, nineteen hundred seventy-five, as though such were the date on which such lists were originally scheduled to terminate or expire.

Id. § 2590-j(3) (McKinney Supp. 1977). Reference in subparagraph (c) is presumably to the litigation in *Chance* v. *Board of Examiners*, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972) (preliminary injunctive relief upheld). *See generally Chance* v. *Board of Examiners*, 561 F.2d 1079 (2d Cir. 1977); *Chance* v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Chance* v. *Board of Educ.*, 496 F.2d 820 (2d Cir. 1974).

New York City and Buffalo, we are informed, are the only New York school districts which administer local teacher examinations in addition to the state licensing requirements. Buffalo's procedures have also been the subject of litigation. *Arthur* v. *Nyquist*, *supra*.

In 1969 the New York City school system was "decentralized" and thirty-two separate community school districts (CSDs) were established. Each CSD was vested with primary authority over the operation of the elementary and junior high schools within its district.[15] Although the Chancellor alone appoints high school teachers, elementary and junior high school teachers may be appointed in either of two ways. One of these is the traditional method of assignment by the Chancellor. The community school boards must abide by the Chancellor's designation.[16] However, the Chancellor "insofar as practicable . . . shall give effect to the requests for assignment of specific persons by the community board.[17] An alternative method is available for use only in those elementary and junior high schools whose students rank in the lower 45% on a comprehensive reading examination which is administered annually to students in schools within the jurisdiction of the local community districts.[18] The community school districts

15 Each community board shall have all the powers and duties, vested by law in, or duly delegated to, the local school board districts and the board of education of the city district on the effective date of this article, not inconsistent with the provisions of this article and the policies established by the city board, with respect to the control and operation of all pre-kindergarten, nursery, kindergarten, elementary, intermediate and junior high schools and programs in connection therewith in the community district.

N.Y. Educ. Law § 2590-e (McKinney Supp. 1977).

16 *See id.* § 2590-j(4)(c) (McKinney 1970). *quoted in* note 13 *supra.*

17 *Id.*

18 The chancellor shall cause a comprehensive reading examination to be administered to all pupils in all schools under the jurisdiction of the community districts annually. Prior to October first of every year each school shall be ranked in order of the percentage of pupils reading at or above grade level as determined by such examination, in accordance with rules to be promulgated by the chancellor.

Id. § 2590-j(5)(a) (McKinney Supp. 1977).

may directly appoint teachers to such "45% schools" if the individual has passed either a qualifying examination prepared by the Board of Examiners or the National Teachers Examination.[19]

Irrespective of how the teachers are appointed, ultimate control still remains with the Chancellor. He retains the power to rescind illegal teacher assignments and to compel a local board's compliance with all applicable provisions of law.[20] In addition, he is vested with all powers and duties

19 The board of each eligible school may . . . appoint any person a teacher in such school . . . without regard to any competitive eligibility lists . . . provided that such person, will . . . have the education and experience qualifications for certification as a teacher . . . and shall have:

(i) passed a qualifying examination to be prepared and administered by the board of examiners, . . . or be on an existing competitive eligible list for such position; or

(ii) passed the National Teachers Examination within the past four years at a pass mark equivalent to the average pass mark required of teachers during the prior year by the five largest cities in the United States which use the National Teachers Examination as a qualification, as determined by the chancellor.

Id. § 2590-j(5)(c) (McKinney 1970).

20 1. If, in the judgment of the chancellor any community board fails to comply with any applicable provisions of law, by-laws, rules or regulations, directives and agreements, and after efforts at conciliation with such community board have failed, he may issue an order requiring the community board to cease its improper conduct or to take required action and consistent with the provisions of this article and the educational and operational policies of the city board, may enforce that order by the use of appropriate means, including:

(a) supersession of the community board by the chancellor or a trustee appointed by him with respect to those powers and duties of such community board deemed necessary to ensure compliance with the order; and

(b) suspension or removal of the community board or any member or members thereof.

Id. § 2590-l.

of the superintendent of schools of the city district[21] which include "the power to transfer teachers from one school to another." [22]

The ESAA applications here at issue were for grants in the 1977-78 school year. *See* note 34 *infra*. To analyze whether there was compliance with the statute and regulations, HEW used 1975-76 data. Racial and ethnic statistics[23] demonstrated that in school year 1975-76 62.6% of high school students were minority students whereas 8.2% of high school teachers were minority teachers.[24] Seventy per cent of minority high school teachers were assigned to high schools in which minority student enrollment exceeded

21 *Id.* § 2590-h (McKinney Supp. 1970).

22 The superintendent of schools of a city shall possess, subject to the by-laws of the board of education, the following powers and be charged with the following duties:

. . . .

6. To have supervision and direction of associate, assistant, district and other superintendents, directors, supervisors, principals, teachers, lecturers, medical inspectors, nurses, auditors, attendance officers, janitors and other persons employed in the management of the schools or the other educational activities of the city authorized by this chapter and under the direction and management of the board of education; to transfer teachers from one school to another, or from one grade of the course of study to another grade in such course, and to report immediately such transfers to said board for its consideration and action; to report to said board of education violations of regulations and cases of insubordination, and to suspend an associate, assistant, district or other superintendent, director, supervisor, expert, principal, teacher or other employee until the next regular meeting of the board, when all facts relating to the case shall be submitted to the board for its consideration and action.

Id. § 2566-6 (McKinney 1970).

23 An injunction against the collection of such racial data has been sought in a related action. *Caulfield* v. *Board of Educ.*, No. 78-6035 (2d Cir. filed Feb. 28, 1978).

24 In the case of District 11 in 1975-76, 11.2% of its elementary school teachers and 63.9% of its elementary school students were members of minority groups.

70%, even though these high schools employed only 48% of the system's high school teachers. Conversely, in high schools in which there were proportionately a low number of minority teachers, minority student enrollments were below 40%.[25]

25 The high schools with proportionately a high or low number of minority teachers are as follows:

High Schools With Minority Student Enrollments Over 90%		*% Minority Teachers*
Harlem	100%	70.0%
Ben Franklin	98.3	27.9
Park East	93.8	40.0
Harlem Prep	98.4	69.2
Lower East Side	100	63.2
M. L. King, Jr.	96.0	25.0
Satellite Acad.	92.7	25.0
Jane Addams	98.7	34.3
Boys & Girls	99.9	20.9
Eastern District	97.0	18.0
Bushwick	94.2	20.4
Pacific	99.8	37.5
Redirection	97.7	47.6
August Martin	97.6	16.7
High Schools With Minority Student Enrollments Under 40%		*% Minority Teachers*
Stuyvesant	31.0%	2.8%
Bronx H.S. of Science	31.3	2.8
Lafayette	29.2	0.6
Midwood	32.6	1.7
Abraham Lincoln	37.0	0.7
James Madison	35.6	0.9
New Utrecht	22.5	0.0
Fort Hamilton	30.0	3.7
Sheepshead Bay	32.5	3.7
F.D. Roosevelt	29.4	1.8
South Shore	36.9	2.4
William Grady	22.2	0.0
Benjamin Cardoza	38.5	3.2
Francis Lewis	36.9	1.7
Forest Hills	38.8	0.8
Long Island City	30.2	2.8
Richmond Hill	28.5	3.4

(Table continued on next page)

Similar correlations between the racial/ethnic composition of the faculty of community school districts and the racial/ethnic composition of the student bodies within those school districts exist. For the same school year, 14.3% of the teachers and 69.7% of the students in elementary schools were minority, and 16.7% of the teachers and 70.1% of the junior high school students were minority. Quite clearly, the schools with minority student enrollments over 90% identifiably had the highest percentage of minority faculty by a substantial margin.[26] Similarly, community school districts with minority student enrollments under 50% contained a disproportionately low percentage of minority factulty.[27]

(continued from preceding page)

High Schools With Minority Student Enrollments Under 40%		*% Minority Teachers*
Bayside	30.4	1.3
New Dorp	4.3	0.0
Curtis	32.1	3.0
Tottenville	3.7	1.9
Susan E. Wagner	13.0	2.5
Ralph McKee	19.1	3.1

26

CSDs With Minority Student Enrollments Over 90%		*% Minority Teachers*
CSD # 1	93.6%	10.4%
4	98.8	24.6
5	99.2	56.7
7	99.0	27.9
9	97.7	26.9
12	98.3	26.7
13	97.0	34.7
14	90.3	14.6
16	99.6	39.0
17	96.1	16.8
19	91.5	12.2
23	99.6	30.0

27

CSDs With Minority Student Enrollments Under 50%		*% Minority Faculty*
CSD 20	31.5%	0.4%
21	34.9	2.5

(Table continued on next page)

Upon the "remand" to HEW, HEW found that the racial assignment of faculty in the central school district was, as HEW put it, "strikingly illustrated by the absence of minority teachers" at certain academic, *i.e.*, nonvocational high schools. Ten of these were demonstrated to have a disproportionately low number of full-time minority teachers in the 1975-76 school year. All ten of these schools were among the thirteen academic high schools[28] with full-time faculties having a percentage of black teachers at or below two standard deviations,[29] which was 1.2%; the mean of

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(continued from preceding page)

CSDs With Minority Student Enrollments Under 50%		*% Minority Faculty*
22	29.1	1.7
24	44.0	5.9
25	29.5	2.6
26	25.8	2.7
27	48.4	7.3
30	48.8	6.2
31	16.3	3.1

Other information indicates that ten of the 32 CSDs in New York City employ minority faculty members in excess of 20%. Those CSDs have minority student enrollments varying from 86.7 to 99.6 percent.

28

Academic High Schools	*% black*	*Total teachers*
Stuyvesant	.9	109
Lafayette	.6	166
Midwood	.9	115
Abraham Lincoln	.7	137
James Madison	.9	117
New Utrecht	0.0	163
Fort Hamilton	.6	163
F. D. Roosevelt	1.2	169
Beach Channel	.7	137
Francis Lewis	.8	121
Forest Hills	0.0	125
Bayside	.7	150
New Dorp	0.0	105

29 In *Castaneda* v. *Partida*, 430 U.S. 482, 496-97 & n.17 (1977), a grand jury discrimination case, the Court adopted a statistical methodology used in the social sciences for the prediction of fluctuations from an expected value, known as the standard deviation, defined for the binomial distribution as the square root of the product of the total num-

full-time black teachers in academic high schools systemwide was then 5.2%.

To take another example for the same school year, 8.2% of academic high school teachers in the Central Board's employ were members of minority groups, black or Hispanic. Lafayette High School, for one, with a total of 166 teachers had only one minority teacher, even though it could have been expected based on systemwide statistics

ber in the sample (n) times the probability of selecting a minority (p) times the probability of selecting a non-minority (q), thus $\sqrt{npq}$. To express the standard deviation in proportionate terms, the formula is $\sqrt{\frac{pq}{n}}$. The statistical approach was also utilized by the Court in a school segregation case, *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 308-09 & n.14 (1977):

> A precise method of measuring the significance of such statistical disparities was explained in *Castaneda* v. *Partida*, 430 U.S. 482, 496-497, n.17. It involves calculation of the "standard deviation" as a measure of predicted fluctuations from the expected value of a sample. Using the 5.7% figure as the basis for calculating the expected value, the expected number of Negroes on the Hazelwood teaching staff would be roughly 63 in 1972-1973 and 70 in 1973-1974. The observed number in those years was 16 and 22, respectively. The difference between the observed and expected values was more than six standard deviations in 1972-1973 and more than five standard deviations in 1973-1974. The Court in *Castaneda* noted that "[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations," then the hypothesis that teachers were hired without regard to race would be suspect. 430 U.S., at 497 n. 17.

See id. at 311-12 n.17. In this case the standard deviation is 1.94% above or below 5.1%, or p, since the average size of academic high school faculties is 128 teachers, and 94.9% is the non-black force of teachers at those schools. The square root of $\frac{pq}{n}$ is 1.94%. Thus, in reference to the schools listed in note 28 *supra*, all have a standard deviation of two or more: 5.1% (minority teachers in all academic high schools) minus 1.94% (one deviation), 1.94% (a second deviation) = 1.2%. If the same calculations are made for the schools referred to in note 28 *supra* with respect to minorities in the teaching population systemwide (8.2%), the difference between the expected percentage of minority teachers to the actual percentage is of course higher. In the case of Lafayette, it would exceed three standard deviations.

to have had fourteen minority teachers. Lafayette's proportion of minority students was 29.2%.[30] In contrast, for the same year Boys High School in Brooklyn had more than two and one-half times the number of full-time minority teachers than the expected rate; its student body was 99.9% minority.[31]

These substantial disproportions are not contested by the appellants, nor do they deny that the schools were statistically "racially identifiable" as a result of the significant disparities in staff assignments. The claim pressed below and on this appeal has been limited to the argument that the statute and regulation must be construed to require HEW to establish that the disparities resulted from pur-

30 HIGH SCHOOL LAFAYETTE (BROOKLYN)

School Year	Total Full Time Teachers	Expected Percent of Minority Teachers	Expected Number of Minority Teachers	Actual Number of Minority Teachers	Extent of Deviation: Percent of Actual To Expected Number of Minority Teachers	Extent of Deviation: Ratio of Expected To Actual Number of Minority Teachers	Percent [sic] of Minority Students
1971-72	241	6.4%	15	1	6.7%	15:1	20.1%
1972-73	216	6.6%	14	1	7.1%	14:1	23.9%
1973-74	219	7.2%	16	1	6.2%	16:1	25.6%
1974-75	196	7.7%	15	1	6.7%	15:1	27.8%
1975-76	166	8.2%	14	1	7.1%	14:1	29.2%

31 At least four schools within District 11 were racially identifiable. In two schools with less than 40% minority students, there were 3.4% minority teachers in one and none in the second. In two schools with minority student concentrations over 92%, there were 29.8% and 24.1% minority teachers. Data for 1977-78 reveal both a slight improvement and a substantial regression. While HEW removed one school from its unsatisfactory list, the other three remained racially identifiable and three aditional schools were deemed in violation of ESAA criteria.

poseful or intentional discriminaton in the constitutional sense. *See* note 2 ***supra.***

III. *Proceedings Before HEW and the District Court*

Only one of the Central Board's three basic grant applications survived program merit competition and obtained a sufficient rank order standing to be considered for funding.[32] On November 9, 1976, the Office for Civil Rights at HEW wrote to Chancellor Anker that it found that teachers, principals and assistant principals were assigned "in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools . . . ."[33] By letter dated July 1, 1977,

32 The Central Board and various community school districts in the city filed a total of 32 applications for basic grants, pilot project grants and bilingual project grants under the ESAA. Of the 32, 20 ultimately demonstrated sufficient program merit to warrant approval in competition with other applications; 3 were above minimum program quality, but were not successful in competing with other applicants; and 9 applications were not minimally acceptable. The 20 applications that warranted approval initially could not be funded because all New York City applicants were disqualified under § 1605(d) of the Act. However, all applicants except the Central Board and CSDs 10 and 11 were able to establish their eligibility with the assistance and advice of the Office for Civil Rights either by providing additional material at show cause meetings pursuant to 45 C.F.R. § 185.46(a)(2) or by taking corrective action and filing successful applications for waivers of ineligibility. The federal defendants were thus able to provide $13,509,079 in ESAA grants to eligible New York City community school districts for the 1977-78 school year. The basic grant total awarded New York City applicants comprises approximately 65% of the basic grants awarded to New York State.

The three New York City applicants unable to establish their eligibility did not take the necessary corrective action to obtain waivers of ineligibility. CSD 10 did not sue to challenge the denial of its ESAA application, but CSD 11 ($298,891) and the Central Board ($3,559,132) did sue. Thus the only plaintiffs in this action which have not received funds for which they applied are the Central Board and CSD 11. Essentially CSD 11's application stands or falls with the Central Board's.

33 By letter dated January 18, 1977, to Chancellor Anker OCR concluded that the Central Board had unlawfully failed to make available

HEW notified the Central Board and District 11 that their grant applications could not be funded because they did not establish their eligibility under 45 C.F.R. § 185.43(b)(2).[34] Thereafter, HEW afforded an opportunity to the Central School Board and to District 11 to achieve voluntary resolution and compliance under 42 U.S.C. § 2000d(1),[35]

equal educational services to minority children. These preliminary findings were revised by a letter dated October 4, 1977, and became the subject of formal administrative adjudicatory hearings in accordance with 42 U.S.C. § 2000d-1 and 45 C.F.R. § 80.8. The October 4, 1977, OCR letter stated, among other things, that students were being assigned in racially identifiable or isolated instructional settings in violation of Title VI. While this finding would also constitute a ground for ineligibility under ESAA, 20 U.S.C. § 1605(d)(1)(C)-(D); 45 C.F.R. § 185.43(c)-(d), the Central Board and HEW have settled their differences and entered into a Letter of Agreement.

34 The regulation is quoted in part in note 11 *supra* and in part in text accompanying note 12 *supra*. On June 20, 1978, HEW disapproved the Central Board's 1977-78 ESAA application.

35 42 U.S.C. § 2000d-1 provides in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient . . . or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement *and has determined that compliance cannot be secured by voluntary means.* In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No

45 C.F.R. § 80.7(d).[36] *See Brown* v. *Weinberger*, 417 F. Supp. 1215, 1221 (D.D.C. 1976). On September 7, 1977, the Central Board and OCR entered into a Memorandum of Understanding. In that Memorandum, the Central Board agreed to assign or reassign teachers to comply with federal standards by 1980. This agreement was subsequently vacated by Judge Weinstein by order dated March 15, 1978, in a related proceeding sub judice before this court. *Caulfield* v. *Board of Education*, No. 78-6035 (2d Cir. filed Feb. 28, 1978).

Neither the Central Board nor District 11 contested the accuracy or the sufficiency of the Government's data and statistics but rather presented explanations to justify the disparities. Appellants contended, ultimately to no avail, that they had not intentionally discriminated. Rather, they argued that disparate assignments resulted from the state education law, from the requirements of collective bargaining agreements, and from demographic changes and other alleged "neutral factors," including the wishes of black principals and the desires of individual parent-teacher associations and of the black and white communities.

On September 27, 1977, the Central Board and District 11 filed a complaint in the district court. The district court reviewed the administrative record and, after a hearing,

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such action shall become effective until thirty days have elapsed after the filing of such report.

(Emphasis added.)

36 If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

45 C.F.R. § 80.7(d)(1) (1977).

not only denied the Central Board's motion for summary judgment, but granted the defendants' cross-motion for summary judgment affirming the denial of ESAA funds. As previously stated, however, the district court vacated its prior decision and remanded the matter to HEW for further consideration in light of constitutional criteria.

Thereafter, HEW determined that the City School District discriminated on a racial basis in the assignment of teachers and maintained an illegally segregated system in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the requirements of ESAA. It also determined that after June 23, 1972, the Central Board took no effective steps to desegregate the system. While the Central Board was given an opportunity to rebut the statistical prima facie case of discrimination, its explanations were not persuasive. HEW, therefore, held that the assignment of minority teachers could have "come about only through foreseeable acts of discrimination."

Similarly HEW determined that District 11 was ineligible for ESAA funds for having discriminated in its teacher assignments on the basis of race, color or national origin. HEW also found District 11's explanations inadequate.

Upon review of the administrative record and the submissions by the Central Board and District 11 and after argument, the district court affirmed the findings and conclusions of HEW as supported by substantial evidence and entered its order granting judgment from which these appeals are taken.

IV. *Discussion*

A. *Constitutional Standard versus Impact Standard.*

The principal argument raised by appellants is that in evaluating the distribution of teachers throughout the New York City schools HEW should have employed the con-

stitutional test of intentional discrimination. *See* note 2 & accompanying text *supra*. To find a violation of the Fourteenth Amendment, the constitutional standard requires a showing not only of disparate impact, but also of illicit motive. *See* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. Rev. 36, 39 (1977).[37]

While appellants argue that HEW's decision to deny ESAA funds relies solely on statistical evidence of disparate impact, contrary to Supreme Court cases construing the Fourteenth Amendment, we need not reach the question whether the evidence supports a finding of purposive segregative intent. Because we are dealing with an act of Congress, as amplified by HEW regulations, and not with a judicial determination whether certain acts have produced a Fourteenth Amendment violation, it is permissible for Congress to establish a higher standard, more protective of minority rights, than constitutional minimums require.[38] For example, Title VII cases have not required

37 Proof of "intentionally segregative actions on the part of the [school] Board," *Dayton Bd. of Educ.* v. *Brinkman*, *supra*, 433 U.S. at 413, can be presumed when the actions taken by the Board as a whole have the natural, probable and foreseeable result of increasing or perpetuating segregation. *See Arthur* v. *Nyquist*, *supra*, 573 F.2d at 142. *Nyquist* approved the intentional segregation standard of *Oliver* v. *Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). *See* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317, 332-43 (1976).

38 Alternatively this case may be analyzed as an exercise of congressional spending power. Congress has not prohibited discrimination in schools generally under its Fourteenth Amendment Section 5 powers, but has simply attached strings on grants of federal funds. *See Lau* v. *Nichols*, 414 U.S. 563, 569 (1974):

> "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

(Quoting Senator Humphrey.) But "simple justice" aside, an exercise of the congressional spending power, here in aid of the Fourteenth

proof of discriminatory motive, at least where the employer is unable to demonstrate that requirements causing a disparate impact are sufficiently related to the job. *See International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-36 n.15 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-06 (1973).[39]

Amendment, is afforded considerable latitude, *see Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), provided that Congress has not imposed unconstitutional conditions on the recipients of its appropriations.

The doctrine of "unconstitutional conditions" is not applicable in the present context. That doctrine provides that "government may not condition the receipt of its benefits upon the nonassertion of constitutional rights even if receipt of such benefits is in all other respects a 'mere privilege.'" L. Tribe, *American Constitutional Law* § 10-8, at 510 (1978); *see Sherbert* v. *Verner*, 374 U.S. 398 (1963) (state may not deny unemployment benefits to persons unwilling to work on Saturdays for religious reasons). No such condition appears here, unless it is the nonassertion of the "right" to have "disparate impact" alone not trigger fund-grant denial. But in the exercise of its spending power Congress may be more protective of given minorities than the Equal Protection Clause itself requires, although the point at which given non-minorities or their members are themselves unconstitutionally prejudiced remains in doubt even after *Bakke*. Still, in the alleviation of discrimination, the effect of congressional findings is not insubstantial. *E.g.*, *Regents of the University of California* v. *Bakke*, 46 U.S.L.W. 4896, 4905-06 (U.S. June 28, 1978) (Powell, *J.*); id. at 4918-19 (Brennan, *J.*); *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977).

39 *See Regents of the University of California* v. *Bakke*, *supra*, 46 U.S. L.W. at 4906 n.44 (Powell, *J.*). In considering the opinion of Justices Brennan, White, Marshall and Blackmun, *id.* at 4922, Mr. Justice Powell suggests that the other Justices are wrong "when they suggest that 'disparate impact' alone is sufficient to establish" a Title VII violation. *Id.* at 4906 n.44. But Justice Brennan's opinion appears to us to have a slightly different nuance from what Justice Powell attributes to it. Justice Brennan states that the Supreme Court's Title VII cases have sustained a statutory violation "even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment," *id.* at 4922, and "have held under Title VII that where employment requirements have a disproportionate impact upon racial minorities they constitute a statutory violation, even

Here, Congress intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an unjustified disparity in staff assignments. This conclusion seems clear from the statute which expressly requires that all ESAA "guidelines and criteria . . . be applied uniformly . . . without regard to the origin or cause of such segregation." 20 U.S.C. § 1602(a). Moreover, the ESAA proscription against employment discrimination forbids discriminatory acts and practices which violate statutory civil rights provisions such as Title VI of the Civil Rights Act of 1964.[40] It is significant that Title VI findings of discrimination may be predicated on disparate impact without proof of unlawful intent. *See Lau* v. *Nichols*, 414 U.S. 563, 568 (1974) ("[d]iscrimination is barred which has [disparate] *effect* even though no purposeful design is present. . . .") (emphasis in original); *Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508, 516-17 (5th Cir. 1976) ("statistical evidence alone may enable . . . plaintiffs to satisfy their initial burden of showing discrimination"); *cf. Griggs* v. *Duke Power Co., supra*, 401 U.S. at 432 (Title VII).

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in the absence of discriminatory intent, unless the employer is able to demonstrate that the requirements are sufficiently related to the needs of the job." *Id.* at 4918 (footnote omitted). The debate, then, would seem to turn on whether in all cases where the employment requirements are insufficiently related to the job there is necessarily discriminatory intent.

40 It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

20 U.S.C. § 1602(b).

To effectuate the disparate impact test mandated by the ESAA, HEW regulations condition eligibility for ESAA funds upon teacher assignment patterns which do not identify schools "as intended for students of a particular race or national origin." 45 C.F.R. § 185.43(b)(2); *see ante* at p. 4522. The regulation appears consistent with the statutory purposes of ESAA and must be approved by the court if it is "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) (quoting *Thorpe* v. *Housing Authority*, 393 U.S. 268, 280-81 (1969)).

B. *Application of Disparate Impact Standard.*

HEW's decision that teacher assignment disparities warranted a denial of ESAA funds was not arbitrary or capricious. 5 U.S.C. § 706(2)(A). *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-17 (1971). Even if the appropriate standard of review were the "substantial evidence" test, the Secretary's denial must be affirmed since the data which we have reviewed above clearly support HEW's determination. It, therefore, follows a fortiori that the evidence precludes a finding of arbitrariness or caprice.

In disregarding "the origin or cause of segregation," 20 U.S.C. § 1602(a), HEW determined that the Central Board failed to present a sufficient justification for the racial disparities in teacher and staff assignments. The proffered justifications for the substantial disparities in the predominantly ten nonminority academic high schools included (1) restrictions on the transfer of teachers written into the collective bargaining agreement, (2) the desirability of teaching assignments in those schools, (3) the unwillingness of many nonminority teachers to teach in predominantly minority schools and (4) the unequal dis-

tribution of licenses in specific areas. None of these explanations is adequate to justify the racial disparities in staff assignments. The unequal distribution of licenses resulted from the very examinations which OCR previously determined had produced a racially significant disparate impact. *See* note 14 *supra*. Leaving aside whether the remaining justifications are sufficient as a matter of law, they have not been supported by adduced facts appearing on the record.

In sum, our holding rests on both a congressionally mandated disparate impact test and nonarbitrary administrative findings of discrimination. *See Regents of the University of California* v. *Bakke*, 46 U.S.L.W. 4896, 4906 (U.S. June 28, 1978) (Powell, *J.*); *id.* at 4922 & n.42. (Brennan, *J.*). Thus, the extent of the injury has been defined and the consequent remedy, here the denial of funds, specified. *See International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 347-48, 371-72; *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 155-57, 167-68 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 762-70 (1976). The district court's remand to HEW was, therefore, erroneous, though immaterial here.

The judgment is affirmed, although on grounds different from those expressed by the district court.

APPENDIX II

Docket No. 78-6083

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of October, one thousand nine hundred and seventy-eight

Present: Hon.James L. Oakes, C.J.,
Hon.William O.Mehrtens,D.J.,
Hon.M.Joseph Blumenfeld,D.J.,
Circuit Judges

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,
Plaintiffs-Appellants,
v.
JOSEPH CALIFANO,JR.,SECRETARY,UNITED STATES DEPARTMENT OF HEALTH,EDUCATION AND WELFARE, et al.,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/
A. Daniel Fusaro
Clerk

Docket No. 78-6083

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held in the United States Courthouse, in the City of New York, on the sixth day of October, one thousand nine hundred and seventy eight.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al,
Plaintiffs-Appellants,
v.
JOSEPH CALIFANO, JR.,SECRETARY,UNITED STATES DEPARTMENT OF HEALTH,EDUCATION AND WELFARE, et al.,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the plaintiffs-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/
IRVING R.KAUFMAN
Chief Judge

APPENDIX III

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Plaintiffs,

-against-

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, et al.,

Defendants.

MEMORANDUM AND ORDER

77-C-1928

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WEINSTEIN, D.J.

TABLE OF CONTENTS

Plaintiffs, the Board of Education of the City of New York, its Chancellor and nineteen local City school Boards, allege that the denial by the United States Department of Health, Education and Welfare of their applications for $17.5 million under the Emergency School Aid Act (ESAA), 20 U.S.C. § 1601 et seq., violates that Act and is arbitrary, capricious and illegal in violation of The Administrative Procedure Act. 5 U.S.C. § 702 et seq. They seek injunctive relief.

H.E.W. defends on the ground that there was ample basis to find a violation of ESAA since teachers in New York City are assigned upon the basis of race, color and national origin. ESAA specifically requires a finding of ineligibility for funds for any school district which after June 23, 1972, utilized any prohibited practice, including "discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency." 20 U.S.C. § 1605(d)(1)(B)(Supp. II 1972)(emphasis supplied).

A compromise at the administrative level resulted in ESAA funds being allocated to all the local districts but District 11. The local districts agreed to reassign their teachers to eliminate racial disparity in teacher census in the schools within each district. Defendants agreed that some 14 million

dollars would be paid to the various acquiescent local school boards. This agreement reduced the amount of funds in dispute from $17.5 million to $3.8 million, a sum currently being withheld from the Central Board and Local Board 11. The other local school boards are no longer in the suit.

This court's power of review is limited. 5 U.S.C. § 706. Had H.E.W. adhered to constitutionally mandated procedure and to statutory standards its decision, whether favorable or unfavorable to the City, would have had to be affirmed. The record before this court suggests that the agency failed to consider the evidence offered by plaintiffs because it mistakenly believed it to be irrelevant. The matter must, therefore, be remanded for further consideration by H.E.W.

I. PROCEDURE IN THIS COURT

On September 27, 1977, this court held a hearing on whether a temporary restraining order should be granted. There were serious disputed issues of fact and law. Without a stay, funds previously set aside for plaintiffs for the 1977-78 school year would have been allocated to other school districts, resulting in permanent loss to the City, to District 11 and to tens of thousands of

children attending New York City's public schools. Accordingly, a temporary restraining order issued requiring the defendants to preserve and set aside $3.8 million, the appropriation originally earmarked for the Central Board and Local Board 11. On consent, the restraining order has been extended until today.

The court ordered the defendants to show cause why an order should not issue (a) rescinding defendants' denial of plaintiffs' application for funding under the Emergency School Aid Act, 20 U.S.C. §§ 1601-1619, and declaring the denial to be violative of that act and of applicable regulations, 45 C.P.R. § 185.01 et seq.; and (b) arbitrary and capricious and violative of 5 U.S.C. § 702 et seq.; (c) restraining defendants, as authorized by 5 U.S.C. § 705, from disbursing funds in the amount of $3,858,023.00 million now earmarked for the ESAA application of plaintiffs' Board of Education of the City of New York and District 11 and ordering defendants to retain funds in escrow for the use and credit of the Board of Education and District 11, pending the determination of this action; (d) granting plaintiffs' judgment awarding such funds to plaintiffs pursuant to its application; and (e) awarding plaintiffs' costs.

An evidentiary hearing was held on October 31, 1977. Additional time to supplement the record was

granted and there were supplementary oral arguments. The hearing, documents submitted by the parties and judicial notice establish the following facts and law.

II. ADMINISTRATIVE PROCEEDINGS

A. Chronology

In January of this year, plaintiffs submitted applications for ESAA funding to the Secretary of H.E.W., through the Regional Office of the Office of Education, H.E.W. The applications sought money for basic, pilot and bilingual programs in the public schools of the City of New York for the 1977-78 school year in Districts 1, 7, 9, 11, 12, 13, 16, 17, 18, 20, 21, 22, 25, 26, 28, 30 and 32 and in the high schools and special educational programs administered by the Central Board. The funds were to provide services for an estimated 40,000 students. On April 14, 1977, the Board, as instructed by the H.E.W. staff, submitted a revised application to defendant Califano. H.E.W. officials then informed plaintiffs that the educational programs described in the April, 1977 ESAA applications met all H.E.W. programmatic and fiscal requirements and that the applications were approved as to content and amount, subject only to a determination that no other legal impediments to funding existed. At this time

ESAA funds of approximately $17.5 million were tentatively approved and set aside by the defendants for the programs of the plaintiffs.

Impediments, however, did arise. In early July, 1977, the plaintiffs received a letter dated July 1, 1977, from defendant Herman R. Goldberg, Associate Commissioner of H.E.W.'s Equal Educational Opportunity Programs. Dr. Goldberg makes preliminary determinations of eligibility for ESAA funding. The letter advised plaintiffs that ESAA funding would be denied to New York City for the 1977-78 school term.

H.E.W. based its decision upon conclusions stated in a November 9, 1976 report by the Office for Civil Rights (OCR). The OCR report was based on an investigation of civil rights compliance in New York City under Title VI of the Civil Rights Act of 1964. It specified areas of alleged noncompliance with the provisions of Title VI. On April 22, 1977, the Central Board, on behalf of itself and the Local Boards, issued a report denying the existence of any discriminatory practice. The report contained supporting data purporting to rebut the conclusions of OCR.

Defendant Goldberg's July 1, 1977 letter cited several grounds for the denial of the plaintiffs' ESAA applications. Subsequently, H.E.W. advised plaintiffs that ESAA funds would be denied to plaintiffs solely on the ground of discrimination in assignment of teachers in the public schools. This is confirmed in Mr. Goldberg's letter of September 19, 1977. The litigation in this court has focused only on this issue.

H.E.W.'s findings were based on OCR statistics that allegedly reflected a low system-wide minority hiring rate in New York City public schools. The statistics reflected a strong correlation between minority teachers and minority students in some schools.

Defendant Goldberg's July 1, 1977 letter of denial also advised plaintiffs that, pursuant to section 185.46 of title 45 of the Code of Federal Regulations, they had an opportunity to show cause before him why the determinations of ineligibility should be revoked.

Plaintiffs requested and were granted such an opportunity. On July 20, 1977, a show cause hearing was held for Local Board 11. The Central Board's hearing was held on July 22, 1977. On July 26, 1977, Local Board 11 submitted supplementary materials as did the Central Board on August 10, 1977.

In a letter dated September 15, 1977, defendant Goldberg informed Local Board 11's Superintendent Nicholas Cicchetti that the information presented by the Board at the July show cause hearings and supplementary materials did not constitute a sufficient basis for H.E.W. to revoke its determination of ineligibility. Chancellor Irving Anker was similarly informed by a letter dated September 16, 1977.

Plaintiffs submitted evidence to H.E.W. in support of requests for waivers of ineligibility pursuant to 20 U.S.C. § 1605(1)(5) and 45 C.F.R. § 185.43(d). However, Chancellor Anker, in his October 26, 1977 affidavit, (p. 15), stated that the Board had already been "advised informally by defendants Goldberg and Tatel that waivers of ineligibility will not be granted to plaintiffs unless the remedy for eligibility is effectuated immediately, that is, a quota of teacher assignments is adopted and implemented by plaintiffs." Plaintiffs also maintain that although they have the right to seek a "Waiver of Ineligibility," such a waiver does not constitute an appeal of the final determination of ineligibility. Rather,

it is a procedure for securing a waiver of that final determination by showing compliance with a remedy ordered by H.E.W. See October 28, 1977 affidavit of Rosemary Carroll, Assistant in the Office of the Corporation Counsel of the City of New York, p. 4. The plaintiffs have exhausted all available administrative remedies.

On September 7, 1977, a number of parties, including the Central Board, independently entered into a Memorandum of Understanding with H.E.W. affecting teacher assignment. The Memorandum reportedly calls for the implementation of a three year plan for a more equal City-wide ethnic teacher distribution in the public schools. H.E.W. has indicated that it regards the Memorandum as compliance with Title VI of the Civil Rights Act. Compliance is apparently required if the City is to receive substantial funds other than those allocated under ESAA. The validity of this understanding is not raised in the instant action and the court makes no finding with respect to it.

B. Failure to Consider Evidence of Plaintiffs

There are no transcripts of the show cause hearings held on January 20, 1977 and July 22, 1977 by H.E.W. The affidavits and the legal memorandum submitted by the parties present conflicting accounts of what transpired at these hearings. Defendants contend that at both hearings defendant Goldberg made an independent finding of fact, considering but rejecting plaintiffs' evidence rebutting the prima facie case of discrimination made out by the statistics. Plaintiffs allege that they offered such evidence but that defendant Goldberg expressly refused to consider it, relying on statistics alone.

Plaintiffs explain in their supporting legal memorandum that because there was no transcript of the show cause proceedings, they have submitted the affidavits of Chancellor Anker and Superintendent Cicchetti. These affidavits, they maintain, represent the gist of the oral presentation made in support of the plaintiffs' 1977-78 ESAA applications. Plaintiffs' Memorandum of October 28, 1977, at p. 3. Chancellor Anker's affidavit of October 28, 1977, reviews in considerable detail the status of teacher assignments in 39 high schools cited in a list attached to defendant Goldberg's July 1, 1977 letter as having student teacher ethnicity levels which "possibly"

indicate that these high schools are intended for students of a particular race, color or national origin. See affidavit at par. 21. "A school by school analysis of this list," Chancellor Anker states, "such as was attempted to be made to defendant Goldberg at the show cause proceeding proves that such inference was entirely unfounded." Id. The rest of the affidavit reviews the status of each school included on the Goldberg list.

Defendant Goldberg's affidavit of October 18, 1977 does not address the question of exactly what he did or did not consider in ruling on the eligibility of the Central Board. In paragraph 19, he states:

> On the basis of the information and recommendations submitted to me by the Director, Office for Civil Rights, I determined that the Central Board did not meet the eligibility requirements for assistance under the Emergency School Aid Act for the reasons set forth in my letter of July 1, 1977 to Chancellor Anker (Exhibit 4, attached hereto).

In paragraph 22, he states:

> I determined that the information presented at the show cause meeting and materials provided by the Central Board under a cover letter to me from Chancellor Anker dated August 10, 1977 (Exhibit 6, attached hereto), did not constitute a sufficient basis to revoke the finding of ineligibility.

The defendants assert in their supporting legal memorandum that at the July 22, 1977 show cause hearing "[T]he Central Board offered no explanation as to why the indentifiability in the high schools existed." Defendant's memorandum of October 28, 1977 at p. 13.

The parties present equally conflicting accounts of the Community School District 11 show cause hearing held on July 20, 1977. Superintendent Cicchetti asserts in paragraph 18 of his affidavit that:

> On behalf of District 11, I submitted data on the two factors which bear on the charge of discrimination i) student population ethnicity patterns and integration strategies and ii) the teacher seniority and transfer right. In particular, I submitted specific data on all factors cumulatively affecting current student and teacher distribution at the schools cited by H.E.W. as "possible" [sites] of discrimination.

In paragraph 21, Mr. Cicchetti states that the agency did not consider District 11's evidence:

> Defendant Goldberg adamantly refused to hear or consider any evidence offered by District 11 to demonstrate eligibility for funding. In fact, defendant Goldberg stated at the show cause proceeding that he would only consider evidence controverting the accuracy of statistics and teacher ethnicity collected by the Office for Civil Rights.

The defendants dispute this. Defendant Goldberg's affidavit of October 18, 1977 does not address the question of exactly what he did or did not consider in ruling on

the eligibility of Community School District 11. In paragraph 20, he states:

> On the basis of the information and recommendations submitted to me by the Director, Office for Civil Rights, I determined that Community School District #11 did not meet the eligibility requirements for assistance under the Emergency School Aid Act for the reasons set forth in my letter of July 1, 1977 to Community Superintendent Cicchetti (Exhibit 5, attached hereto).

In paragraph 22, he states:

> I determined that the information presented at the show cause meeting and materials provided by the Central Board under a cover letter to me from Chancellor Anker dated August 10, 1977 (Exhibit 6, attached hereto), did not constitute a sufficient basis to revoke the finding of ineligibility.

In their brief, defendants contend that

> The plaintiffs did not challenge the accuracy of the information set forth in the July 1, 1977 letters of ineligibility (Exhibits 4, 5) at their show cause meetings or through correspondence; they did not provide Dr. Goldberg with any factual information concerning faculty assignment to permit him to revoke his determination of ineligibility.

Defendants' Memorandum of October 28, 1977, at p. 40. See id. at 44-46.

Faced with these sharply conflicting representations, the Court must, at this stage of the litigation, place substantial reliance on the contemporaneous documents.

Chief among these are the July 1, 1977, September 15, 1977, and September 16, 1977 letters written by defendant Goldberg. As noted above, these letters bear out the plaintiffs' contention that defendant Goldberg relied only on raw statistics in making his determinations of ineligibility for the Central Board and District 11.

In effect, the government confirmed plaintiffs' charge with respect to the nature of the show cause hearing. It took the position in this court that a full hearing requirement does not apply to the ESAA,

> Now a Fourteenth Amendment investigation does not take place. We would not want to represent that it does.

Transcript, October 31, 1977, at p. 38. At the outset of the hearing the court questioned the government about the evidence considered by Dr. Goldberg in making his eligibility rulings for Local Board 11 and the Central Board. A recess was granted so that the government could contact Mr. Goldberg. Following the recess the government advised the court:

> [W]e were advised by the Office of Education that Dr. Goldberg considered the statements and evidence presented to him by the Board, that he determined it was irrelevant and therefore he didn't have to decide whether it was true or not.

Transcript, October 31, 1977, at p. 27.

> At the informal hearing, statements and reasons were presented. Dr. Goldberg considered those but determined they were irrelevant, even assuming they may be true.

Transcript, October 31, 1977, at p. 33.

Plaintiffs were, it thus appears, granted a hearing where the evidence they submitted was not considered. The position of defendants is that this evidence is irrelevant--that is to say, even if it were true it could not change the result. In short, the defendants relied solely on the statistical disparities referred to in the November 9, 1976 letter of OCR.

III. EVIDENCE BEFORE H.E.W.

Denial of the funds involved in this litigation is based on findings by H.E.W. that teachers in New York City are assigned by the Board of Education in a racially discriminatory manner. In support of this finding defendants argued in this court that the City's agreement of September, 1977, with H.E.W., designed to reduce racial disparities in teacher school assignments, is a concession that teacher assignments have been made illegally in the past. But this agreement was reported to be in the nature of a consent judgment without any confession by the City of illegality. It was said to have been entered into to avoid the possibility of withholding hundreds of millions of dollars

in federal funds. Compare Letter of Director of Office of Civil Rights of H.E.W. of November 9, 1976 with his letter of September 9, 1977 and enclosure. To use this agreement as the evidentiary basis for withholding separate educational funds would be quite unfair. This purported justification for finding plaintiffs guilty of racial discrimination in teacher assignment is without merit.

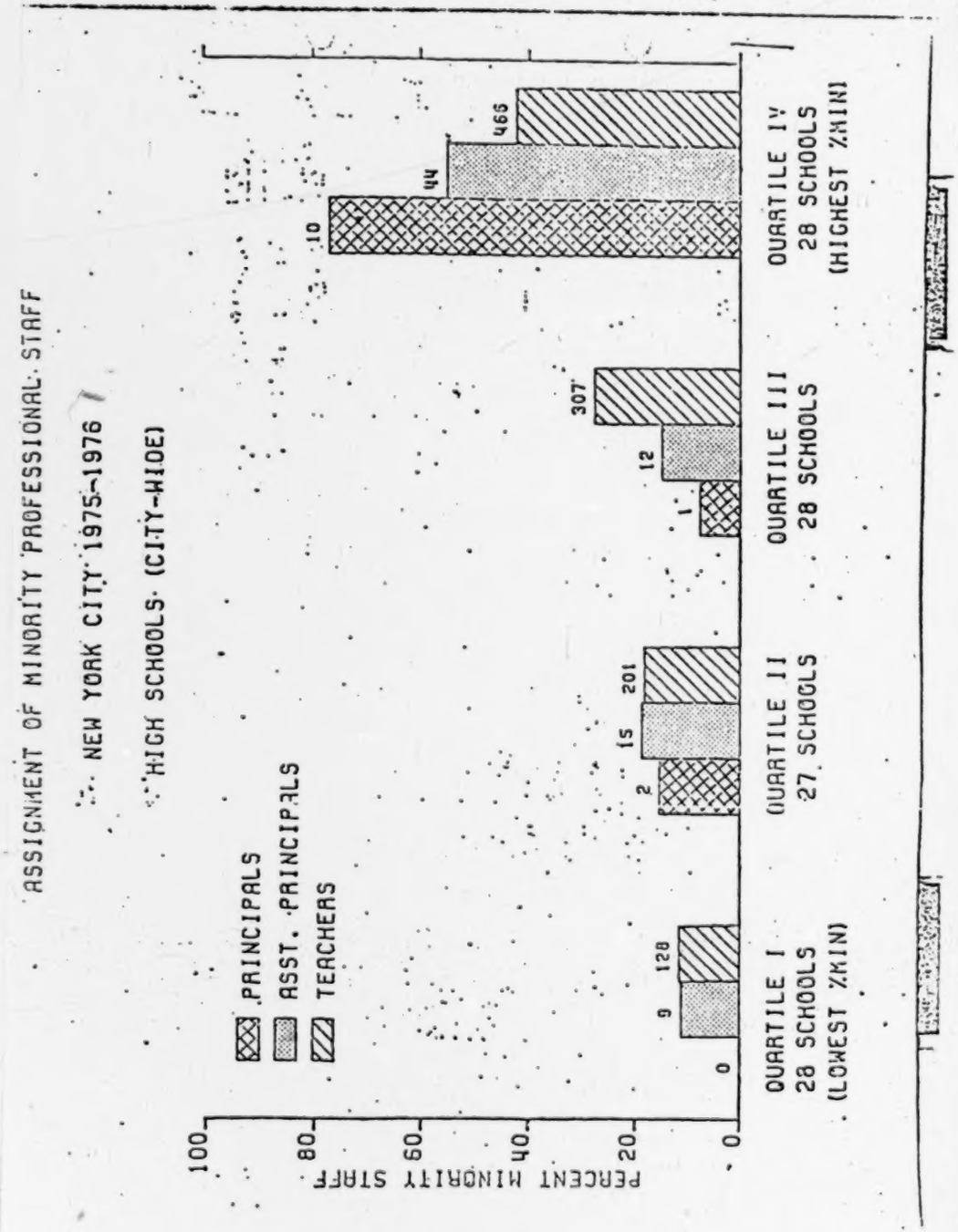
Equally without merit is the City's contention that the approval by H.E.W. of grants to the individual community school districts prevents its denial of a grant to the Central Board of Education. Within each of the school districts there has apparently been an agreement to equalize the assignment of teachers so that no school will have a disproportionate number of minority teachers. This may insure that within each district there is no pattern or practice of discrimination. But it does not insure that in the City as a whole there will be no such practice.

A. The Central Board

1. Citywide Statistics Showing Racial Disparity

The statistical data does lend support to H.E.W.'s finding that subsequent to 1972 there was a pattern of assigning teachers by the Central Board in a way that would tend to correlate the race of the teacher with the predominant race of the students in the school. There is a direct correlation between the numbers of minority teachers and the percentage of minority students in the City's schools when the schools are broken down into groups of low medium and high minority school population.

Set out below is a graph illustrating this correlation at the high school level for the school year 1975-1976. Information on the high schools is particularly damaging to the Central Board's case since it, and not the Local Boards, controls high schools.



An example of the statistical pattern at the elementary school level is set out below for the prior school year, 1974-1975.

DISTRIBUTION OF TEACHER POPULATION BY MINORITY AND NON-MINORITY GROUP
MEMBERSHIP AND DEGREE OF SCHOOL INTEGRATION
ALL ELEMENTARY SCHOOLS: 1974-1975

PERCENT MINORITY PUPILS PER SCHOOL	SCHOOLS		TOTAL TEACHERS		NON-MINORITY TEACHERS		MINORITY TEACHERS	
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
0 - 9.9	49	7.9%	1,595	6.0	1,576	6.9%	19	0.6%
10 - 24.9	83	13.4	2,787	10.5	2,751	12.0	36	1.0
25 - 49.9	103	16.6	3,552	13.4	3,439	15.0	113	3.2
50 - 74.9	62	10.0	2,741	10.4	2,522	11.0	219	6.3
75 - 89.9	51	8.2	2,481	9.4	2,195	9.6	286	8.2
90 +	271	43.9	13,255	50.3	10,474	45.5	2,921	83.8
TOTAL	619	100.0	25,451	100.0	22,957	100.0	3,494	100.0

The disparity in ratios in the last and the current school years has apparently not changed appreciably despite perturbations of major teacher layoffs as a result of the City's fiscal crisis.

2. Plaintiffs Evidence Explaining Disparities On Grounds Negativing Discrimination

a. The High Schools

Substantial evidence was presented by the Central Board that there was neither intentional discrimination nor a pattern or practice after 1972 of assigning teachers by race. Particularly striking is the Central Board's school-by-school analysis of the history of some 40 high schools where the minority teacher and minority student populations correlate.

For example, the list includes Harlem, Park East, Harlem Prep, Lower East Side Prep, Satelite Academy, Pacific, Redirection and Auxiliary Services--all independent alternative high schools. They are mini-schools with student populations of 100; most high schools enroll between 1,200-3,000 students. Arguably, they should not properly be part of an analysis of staffing pattern in New York City high schools because the unique historical development of these schools, the exceptional methods of teacher selection, and their special educational programs and curriculum all preclude comparison with other

high schools. The students in these schools have all dropped out of other schools. Because of various impediments to learning such as drug addiction, pregnancy, criminal records, or more generalized social maladjustment these students require curriculum programs and counselling different in focus and concentration from that offered in other high schools. The schools themselves were originally private community schools. They have traditionally offered personalized guidance services, flexible curriculum and staggered teacher hours geared to the special needs of their students. For example, many of these schools operate into the evening hours. Teachers, thus, must be willing to work long and inconvenient hours. They must be motivated to develop contacts in the community, participate in family counselling and in general perform a myriad of duties which reflect a pervasive commitment to teaching children with special problems that affect their ability to learn. Recognizing the degree of teacher commitment necessary to meet the challenge at these special schools, the Board relies solely upon voluntary applications for staffing these alternative schools. There is, thus, arguably, no comparability between these schools or their teaching staffs and other high schools.

The high school staffing pattern reflects the academic subject matter or vocational courses offered at the specific high school. Generally the license areas with the fewest number of qualified and licensed teachers are mathematics, chemistry, physics, English and most recently Spanish and Hebrew. Eligible lists for these areas are completely exhausted and recertifications and even substitute licensed staff are recruited to fill such vacancies. For the bilingual areas, license examinations were developed only recently. On the other hand, some license areas traditionally have had greater numbers of licensed minority teachers than other. For example, the minority passing rate for an English high school license was relatively high, 49.23% (1974) and for a Social Studies high school license, low, 7.69% (1974). There is a greater incidence of minority group members possessing pedagogical licenses in home economics, cosmetology, and nursing, than, for example, in math, physics or chemistry. Staffs also reflect the teacher attrition rate and transfers. Schools with average teacher longevity of 10-15 years will more often be predominantly White than minority in teaching staff since the percentage of minority teachers with college degrees at that earlier period was even lower than the current 6% of all college graduates. The existence of these factors affecting distribution precludes,

the Central Board argues, a random distribution of 8.3% of minority teachers in every high school.

Bushwick and Eastern District High Schools both have high concentrations of Hispanic children who are non-English dominant. These schools provide the Aspira consent decree program, Title VII bilingual programs and English as a Second Language Program. Of the 130 teachers at Eastern District, 16 are Hispanic. Even using H.E.W.'s mathematical method of determining discrimination, subtracting these 16 teachers from the 18.0% minority teachers at that school puts its staffing level near the 8.3% high school-wide minority teacher population. Similarly, of Bushwick High School's 146 teachers, 6 are Hispanic. Subtracting these teachers from the minority teacher percentage puts that school's minority teacher percentage within 5% of the 8.3% figure. The Central Board is required to provide the Aspira program to all eligible children and has consequently had to hire bilingual staff on an expedited basis. The educational justification for a resulting concentration of Hispanic teachers in schools with high percentages of Hispanic children seems clear.

August Martin High School succeeded Woodrow Wilson High School in Southeastern Queens and was, when

opened in 1971, the only magnet thematic school in the City. The theory of a magnet school is that by developing a curriculum around an innovative educational theme students of all backgrounds will be attracted to attend the school. August Martin's location near John F. Kennedy International Airport made it an ideal site for a magnet school emphasizing aerospace studies. Teachers generally were selected from eligible lists to fill staff positions at August Martin but in instances where there were no licenses for specific areospace subjects, recruitment of persons with the most related backgrounds was undertaken. For example, there is no license in flying instruction, but a common branches teacher with a flight instruction service was hired and 150 students fly planes as part of the program. Similar selections were made for avionics, radio communication and other courses for which there are no specific licenses. The school, which is located in a largely Black middle class area, has a high attendance rate of 91% and 90% of its students go on to college. It has a work-study cycle at Kennedy Airport providing jobs in airplane maintenance, repair and airline clerical and reception work. It has six Title I teachers all of whom are monitored by Title I compliance teams. Many of the minority teachers have been part of the school staff since the time it was Wilson High

School. In assigning teachers to the innovative programs at this school the Board has not assigned teachers on the basis of race, but rather on the basis of possession of specific licenses in the subject areas to be taught, or by assignment of persons with relevant experience and most comparable licenses.

It is apparent from this detailed analysis that, had the Central School Board attempted to achieve a City-wide minority teacher average in each of its high schools, the result might have been improvements in statistics but deterioration in educational programs. Although each school's situation is explicable, H.E.W., given its expertise, might, however, have concluded that the overall City-wide pattern itself had not been sufficiently justified.

b. Justification of Disparities as Beyond Central Board's Control

The Board of Education contends that it is caught in a whirlpool of circumstances from which it cannot escape and that it has not intentionally discriminated. The factors it points to include State law; demographic changes in the student population of the City schools; collective bargaining agreements with neutral date of hire seniority practices; low minority incidence in the relevant available teacher work force; and incidence and distribution of vacancies in specific teacher license areas.

1. State Law on Teacher Appointment

All teacher appointments and assignments in New York City public schools until 1970 were made pursuant to the provisions of Education Law sections 2569 and 2573. Under that statutory scheme, the Board of Examiners conducted competitive examinations for pedagogical licenses and promulgated lists of candidates ranked in order of performance on the examinations; eligible lists were then certified to the plaintiffs for appointment and assignment of teachers in rank order.

The Education Law also permitted assignment of persons with substitute license where there were an insufficient number of regularly licensed teachers to fill vacancies. Eligible lists have never described or identified the national origin or race of candidates for pedagogical assignment.

While this statutory pattern continues to be applicable in the City's high schools, a new method for teacher appointment and assignment for the City's elementary, intermediate and junior high schools was created by the 1969 amendments to the Education Law. This change was designed, in part, to achieve affirmative action goals in minority teacher hiring. Effective September, 1969, the New York City school system was restructured into 32 decentralized

Community School Districts. Subject to some powers retained by the Central Board and the Chancellor, the Districts were authorized to appoint and assign teachers. Educ. L. § 2590-e(2).

As part of the decentralization law, three alternative methods of teacher appointment and assignment were provided for schools within community school districts where the reading level is below the 45th percentile of reading scores for the local school district. Education Law § 2590-j(5). Appointments in such schools may be made from (1) eligible lists regardless of candidate ranking, (2) the National Teachers Examination, a qualifying (i.e., non-ranked) rather than a competitive examination, administered nationally by the Education Testing Service, or (3) lists resulting from qualifying examinations prepared and administered by the Board of Examiners. The last of these lists had the lowest ratios of minority teachers. Appointments to the top 55 percentile reading score districts were to be made from ranked lists containing relatively small numbers of minority teachers.

These amendments to the Education Law were enacted with the stated purposes of (1) equalizing reading achievement levels; (2) increasing the number of minority teachers employed in the New York public school system; (3) eliminating overutilization of substitute licensed teachers;

and (4) encouraging local community solutions to educational problems. The technique used was in the nature of a political compromise that satisfied minority groups, which obtained more minority jobs in minority districts, without offending Whites, who could continue to choose teachers from predominantly White teacher lists purportedly chosen on a merit selection basis.

Revisions of the New York Education Law were based on a number of racial factors which could no longer be ignored. City public school student population had dramatically changed from predominantly non-minority to predominantly minority. The percentage of minority teachers--7% in 1969--though consonant with the percentage of minority individuals in the relevant available work force--5% of college graduates in the United States and the New York Metropolitan area--was relatively static and disproportionate to the continually increasing minority student population. Low reading achievement, particularly among minority students, fostered a developing educational consensus that minority teacher role-model theories should be explored, at least experimentally, in schools where low reading levels warrant new educational approaches. Minority teacher hire rates had increased in school districts where the National Teachers Examination and qualifying, rather than competitive examinations for teacher selection, had been utilized

experimentally. An overdependence on substitute licenses was developing in various school districts, particularly those with high concentrations of minority students; this development was due in part to reluctance of some older teachers with tenure to teach in schools in areas with high minority populations where crime rates and violence was greater than in some other areas of the City. White teachers tended to live closer to schools with White student bodies while Black and Hispanic teachers tended to live closer to schools with high minority ratios; to the extent that convenience of teachers and their social and professional friendships entered into assignments, there was a tendency towards ethnic concentrations.

Teacher hiring during the period 1970-71 through 1974-75 indicated that the purpose of the amendments to the Education Law--increasing minority teachers--was substantially realized. For Blacks the percentage change was + 15.2%; for Hispanics it was + 112.6%. The overall percentage of minority teachers in the school system more than doubled from 7% in 1969 to 15% in 1976. In view of the tenure of older teachers, the contraction of the public school system under fiscal pressures, reductions in students due to a drop in birth rates, increases in private school enrollment, and loss of central city population, this change is reflective of a strong policy

to increase the percentage of minority school teachers.

One predictable result of these statutory changes was that a disproportionate percentage of the new minority teachers were assigned to schools with disproportionately high minority school populations. The districts in the lowest 45 percentiles of reading scores were the districts with the highest minority populations. Local pressures of the minority populations to ignore the ranked lists in these districts meant that Black teachers found it easier to obtain jobs in these districts than in the White-controlled, White student districts.

An irony of this litigation is that among the circumstances that now serve to block ESAA funding is the more than twofold increase in minority teachers in the school system between 1969 and 1976. During this lawsuit, the federal government has acknowledged that it has no desire to challenge the constitutionality of the 1969 amendments to New York's Education Law. It approves the resultant growth in the proportion of minority teachers but not their assignment to predominantly minority schools.

2. Demographic Changes

In 1957, the student population of the New York City School District was 68.3% non-minority; in 1975, 32.1% non-minority. During the same period the non-minority population of New York City decreased by 702,699, while the minority population increased by 815,566. Non-minorities continued to leave the City in larger, and enter the City in smaller, percentages than minorities. The birth rate of the minority population has been substantially higher than that of others. Moreover, the ratio of minority students to others in non-public schools remains relatively low and private school enrollment has continued to increase.

Housing patterns in virtually all boroughs of the City of New York reflected such large concentrations of minority and non-minority groups that zoning of school feeder patterns to achieve racial balance became increasingly difficult during the 1960's and 1970's. To improve racial balance, the Board devised various zoning strategies, such as choice of admissions, paired schools, and scrutiny of school site selection. It is apparent, nevertheless, that the schools have become more, rather than less, desegregated and that this trend continues virtually unabated.

3. Contractual Provisions and Court Orders

Teacher assignments reflect date-of-hire seniority under provisions of the collective bargaining agreement

between the Board of Education and the United Federation of Teachers which provide that vacancies as they arise must be offered in the first instance to teachers with the greatest length of service. Under these contractual provisions, on May 15 of each school year, teachers have been able to request transfers to system-wide vacancies based upon system-wide seniority. As a matter of self-selection, teachers choose schools near their homes or schools they find more congenial. Ethnic concentrations result.

Vacancies in specific licenses must, where possible, be filled by licensed persons. Thus, the number of minority and non-minority persons possessing specific licenses and the number of vacancies in a particular license area determine the incidence and distribution of teachers in the school system--these are ethnic concentrations based upon historical ethnic favoring of some fields more than others.

Implementation of the consent decree in Aspira of New York, Inc. v. Board of Education, 72 Civ. 2004 S.D.N.Y. August 29, 1974), requiring the provision of bilingual instruction to Spanish-dominant children resulted in the concentration of Hispanic teachers in schools with high Hispanic student populations.

Some reversal of the tendency to minority concentration is now expected. Under a newly developed teacher recall plan for fall 1977, assignments of teachers will be made so as to further racial balance of teaching staffs in all schools, not inconsistent with the Aspira consent decree.

B: Community School District 11

Only two schools in District 11, P.S. 111 and P.S. 112, out of 31, have both a disproportion of minority students and minority teachers. The staffs of these schools were apparently assembled prior to 1960, before they were minority schools. Transfer of the experienced minority teachers from these schools to others to achieve a statistical racial balance would, according to Local Board 11, disrupt current teaching programs to the disadvantage of both students and teachers. In District 11, the practice since 1972 has been, plaintiffs assert, to attempt to reduce the correlation between minority students and minority teachers by making all new assignments of minority teachers to non-minority schools. It remains to be determined whether any fluctuation in the minority teacher population in these schools was de minimis or statistically significant. See Hazelwood School Dist. v. United States, 97 S.Ct. 2736, 2743-44 (1977).

The City presents the following statistics and explanation concerning the assignments of teachers to P.S. 112 and P.S. 111.

The assignments of teachers to P.S. 112 are as follows:

	Total per Dist. 11	Total per H.E.W.	Min. Total per Dist. 11	Min. Total per H.E.W.
1971-72	33	32	6	6
1972-73	34	33	7	7
1973-74	33	36	5	6
1974-75	33	33	7	8
1975-76	24	29	6	7

For the year 1972-73, a teacher went on leave and was replaced by the non-permanent assignment of a minority substitute teacher in 1973-74; another teacher went on leave and 1 Black teacher achieved a license in Special Education and left the school reducing the number of minority teachers to 5. In 1974-75 the teacher on leave returned and 1 part-time bilingual teacher for a bilingual program was hired. In 1975-76 the bilingual program was not renewed and the number of minority teachers was again 6 as it had been in 1971-72.

The assignments to P.S. 111 are as follows:

	Total per Dist. 11	Total per H.E.W.	Min. Total per Dist. 11	Min. Total per H.E.W.
1971-72	42	48	11	19
1972-73	42	55	10	13
1973-74	44	58	11	17
1974-75	34	59	12	18
1975-76	39	47	11	14

Similarly for P.S. 111, the number of minority teachers was 11 in 1972 and is presently 11 with fluctuations resulting from teacher leaves and substitute assignments. November 9, 1977 affidavit of Nicholas Cicchetti at pp. 1-2.

H.E.W. disagrees with Local Board 11's justification. It maintains that the facts in the administrative record do not support plaintiffs' representations, but rather establish that since June 23, 1972, minority faculty members have been added to P.S. 111 and P.S. 112. H.E.W.'s own

analysis leads to the following percentages:

	% Minority Faculty P.S. 111	% Minority Faculty P.S. 112
1971/2	39.6	18.8
1972/3	23.6	21.2
1973/4	29.3	16.7
1974/5	30.5	24.2
1975/6	29.8	24.1

Gov'ts brief of November 10, 1977, at pp. 4-6.

The parties also disagree as to the proper interpretation of teacher statistics for P.S. 83 and P.S. 108, predominantly non-minority schools determined to be racially identifiable as a result of faculty assignments. The defendants present the following statistics for P.S. 108:

P.S. 108

Year	Total Faculty	Non-Minority Faculty	%Non-Minority Faculty
1971/2	23	22	95.7
1972/3	19	19	100.0
1973/4	18	18	100.0
1974/5	19	19	100.0
1975/6	15	15	100.0

Id. at p. 7.

Plaintiffs explain that District 11 is predominantly minority in student population (60%) although the surrounding community of the Bronx is predominantly non-minority in

residential population. That disparity in distribution of population results primarily from the fact that 17,000 children attend parochial schools in the District 11 area which have an 80% non-minority student population. Notwithstanding this demographic factor, P.S. 108 is an integrated public school with more than 50% non-minority students. There was, in 1971-72, one minority staff member--not a teacher, but rather a Bilingual School Community Coordinator who left the school to assume a supervisory position in another community school district. P.S. 108 has experienced a declining student register so that the teaching staff has consequently been reduced and teachers excessed to other schools or other districts. (23 teachers in 1971-72; 13 in 1977.) In view of the reduction in teaching staff there has, according to plaintiffs, been no opportunity to increase the minority teacher rate at this school until this school year when one special services' teacher was hired. November 9, 1977 affidavit of Nicholas Cicchetti, at pp. 2-3.

H.E.W. states that in P.S. 83 there were increases in the number of non-minority full-time faculty members. It presents the following statistics:

P.S. 83

Year	Total Faculty	Non-Minority Faculty	%Non-Minority Faculty
1971/2	36	34	94.4
1972/3	37	36	97.3
1973/4	35	34	97.1
1974/5	36	35	97.2
1975/6	29	28	96.6

Gov'ts brief of November 10, 1977 at p. 6.

Plaintiffs explain that P.S. 83 is an integrated public school. There were two minority teachers assigned to the school in 1971-72. One teacher was a substitute, that is not a regularly appointed member, who took an appointment in another school district. At P.S. 83 there has been a significant decline in the student register which has reduced the number of teachers assigned to the school from 37 in 1971-72 to 16 in 1977. Thus, teachers have been excessed from this school and there has been in fact no decline or change in the number of minority teachers assigned to this school since 1971-72. November 9, 1977 affidavit of Nicholas Cicchetti at p. 3.

IV. LAW

Congress adopted the ESAA as Title VII of the the Education Amendments of 1972. One purpose of the Act, Congress declared, is the provision of financial assistance to local educational agencies "to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools. . . ." In section 702 of the Act, 20 U.S.C. § 1601 (Supp. II 1972), Congress expressed the need for federal funds to assist in "eliminating or preventing minority group isolation and improving the quality of education for all children." The Act makes funds available for a variety of enumerated activities related to its stated objectives. It sets forth standards for determining eligibility for assistance, 20 U.S.C. § 1605(a)(1) (Supp. II 1972) and criteria for evaluating applications for such assistance. 20 U.S.C. § 1609(c)(Supp. II 1972).

Congressional hearings on the bill make clear that eligibility for ESAA funding--specifically waivers of ineligibility after a finding of constitutionally proscribed segregation--do not depend upon absolute racial balancing of faculty and staff in every school. The colloquy between Congressman Esch and Congressman Puchinski, the bill's

sponsor is illuminating on the issue.

> Mr. Esch: I would like to inquire of the gentleman from Illinois, who is chairman of the subcommittee which produced this bill.....about one critical aspect of eligibility for assistance under this amendment. Will the Secretary be authorized to apply the holding in the Singleton case which is that you have to have a perfect racial balance in the faculty in every school in your district - as a condition or requirement for assistance under this program.
>
> Mr. Puchinski: The answer is absolutely not. If it did, very few school districts could qualify. The Secretary will have to apply the eligibility requirements spelled out in this amendment and those do not include racial balancing of faculty and staff in every school.

117 Cong. Rec. 39332-33 (1971).

The statute and applicable regulations speak of discriminatory practices after June 23, 1972. See 20 U.S.C. § 1601-12, 45 C.F.R. § 185.00 et seq. and 5 U.S.C. § 702. Section 1605(d)(1)(B) of title 20 of the United States Code provides that:

> no educational agency shall be eligible for assistance. . .if it has, after June 23, 1972,. . .engaged in discrimination based upon race, color or national origin in the hiring, promotion, or assignment of employees in the agency. . .

(Emphasis added.) Promulgated under section 1605(d)(1)(B) of title 20 is 45 C.F.R. section 185.43(b)(2) upon which

defendants assert plaintiffs' ineligibility for funding rests. Arguably, statistical data alone might be relied upon in enforcing the regulation since it refers to identification of schools--presumably by percentages of students or staff of certain races, colors or national origins. That section reads:

> no educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy or procedure which results in discrimination on the basis of race, color or national origin in the. . .assignment of any of its employees. . .including the assignment of full-time classroom teachers to schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color or national origin.

(Emphasis added.)

Plaintiffs maintain that defendants have construed section 185.43(b)(2) to require the denial of ESAA funding merely because of a disparate incidence or distribution of minority teachers. This result-oriented construction, plaintiffs contend, is erroneous. It is inconsistent with section 1605(d)(1)(B) and misconstrues the regulations because, in effect, it creates an irrebutable presumption that disparate ethnic statistics of teacher incidence and distribution constitute discrimination in teacher assignment violative of ESAA.

Plaintiffs insist that disparate impact evidenced by statistical data is not tantamount to discrimination. According to the plaintiffs, the Constitution, statute and regulation require that evidence that a disparity results from neutral factors, rather than from a discriminatory purpose or plan, must be considered by H.E.W. in determining whether the assignment and hiring pattern observed bars eligibility for ESAA funding.

A. Burden of Proof

Statistical disparities alone provide the basis for a rebuttable, not an irrebuttable, presumption of discrimination. Irrebuttable presumptions are disfavored. In adopting a rule of evidence shifting only the burden of coming forward, Congress suggested a general policy against powerful presumptions unless it specifically found the need for a more powerful presumption. Fed. R. Evid. Rule 301; Cong. Record, Sept. 14, 1974, H 11929-11930. The Supreme Court has shown some disquiet with use of irrebuttable presumptions to deny important rights. Cf. e.g., Cleveland Bd. of Ed. v. La Fleur, 414 U.S. 632, 94 S.Ct. 791 (1974); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).

In Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976), the Court rejected the proposition that racial disproportion necessarily reflects illegal discrimination. It noted:

> But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

Id. at 239, 96 S.Ct. at 2047 (emphasis in original). The Court explicitly held that:

> Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id. at 242, 96 S.Ct. at 2049. Citing Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221 (1972), a case concerning discrimination in a jury selection, the Court gave further instruction on how the burden of proof shifts in a racial discrimination case:

> With a prima facie case made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral criteria and procedures have produced the monochromatic result." Alexander, supra, 405 U.S. at 632, 92 S.Ct. at 1226, 31 L.Ed.2d at 542.

Id. at 241, 96 S.Ct. 2048.

Some aspect of mala fides, no matter how remote or indirect, must be attributable to the defendants before they can be found to have illegally racially discriminated. Whether an unacceptable state of mind be reflected by acting with intent to discriminate, Keyes v. School Dis. No. 1, Denver, Colorado, 413 U.S. 189, 93 S.Ct. 2686 (1973), or failing to act with intent that the failure have a discriminatory effect, or by willful or even negligent disregard of the racial effect of an act or failure to act, Hart v. Community School Bd. Ed., N.Y. Sch. Dist. 21, 512 F.2d 37, 51 (2d Cir. 1975), some delict, some illegal purpose, some blameworthy failure on the part of a defendant as a reason for accountability is required.

B. Intent to Discriminate

In Keyes v. School Dis. No. 1, Denver, Colorado, 413 U.S. 189, 93 S.Ct. 2686 (1973), the Court addressed the question of how intent is to be established in school desegregation cases. The Court first observed:

> There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, "is merely a question of policy and fairness based on experience in the different situations." 9 J. Wigmore, Evidence § 2486, at 275 (3d ed. 1940). In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated.

Id. at 209, 93 S.Ct. at 2698. It then noted that in discharging their burden of proof that segregated schooling is not also the result of intentionally segregative acts, "it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions." Rather, "[T]heir burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." Id. at 210, 93 S.Ct. at 2698.

More recent discussions of discriminatory intent are found in Village of Arlington Heights v. Metropolitan Housing Development Corporation, --U.S.--, 97 S.Ct. 555 (1977) and Dayton v. Brinkman, 45 U.S.L.W. 4910 (June 27, 1977). Arlington involved a petition to rezone from single to multiple family classification, designed to increase minority housing facilities. The petition was denied by the Village of Arlington, an almost entirely White community. The Court of Appeals held that the "ultimate effect" of the Village's denial was racially discriminatory. The Supreme Court reversed.

> Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance.

Village of Arlington Heights, supra at 566. In note 21

the Court explained that:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing.

Id. In reaching its holding, the court identified, "without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." Id. at 565. It declared:

> Determining whether invidious discriminatory purpose was a motivating factor, demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action--whether it "bears more heavily on one race than another," Washington v. Davis, 426 U.S., at 242, 96 S.Ct. at 2049--may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . .The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence.

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . .The specific sequence of events leading up the challenged decision also may shed some light on the decision-maker's purposes. . . .For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
>
> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. . . .

Id. at 564-565 (footnotes and citations omitted).

The Court reiterated its position in Dayton v. Brinkman, supra. In that case, the Court concluded that the remedy imposed by the Court of Appeals was out of proportion to the constitutional violations found by the District Court. It noted:

> The finding that the pupil population in the various Dayton schools is not homogeneous standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board. Washington v. Davis, 426 U.S. 229, 239 (1976).

Id. at 4912. The Court further observed:

> We realize, of course, that the task of fact-finding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multimembered public bodies are of necessity difficult, cf. Village of Arlington Heights v. Metropolitan Housing Development Corp., 45 L.W. 4073 (Jan. 11, (1977), and the question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.

(Emphasis added.) Id.

In defining the concept of discriminatory intent, the Second Circuit has made it clear that so long as there is "foreseeable effect," there need not be a finding of racial motivation. Hart v. Community School Bd. Ed., N.Y. Sch. Dist. 21, 512 F.2d 37, 51 (2d Cir. 1975). Affirming the district court, the Court of Appeals held that:

> We conclude that enough has been shown of intentional state action through the community school board and its predecessor local school board to support a finding of segregative intent from the foreseeable consequences of action taken, coupled with inaction in the face of tendered choices.

Id. The Court also endorsed the language of the Sixth Circuit in Oliver v. Michigan State Bd. of Ed.:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies. 508 F.2d 178, at 182 (6th Cir. 1974); cf. Higgins v. Board of Education, 508 F.2d 779 (6th Cir. 1974).

C. ESAA Standards

The cases interpreting ESAA indicate that while a statistical case will suffice to support a finding of illegality, rebutting evidence may establish legality. "A prima facie case of unconstitutional discrimination exists where it is possible to identify a 'white school' or a 'black school' simply by reference to the racial composition of its teachers and staff." Kelsey v. Weinberger, 498 F.2d 701, 706 at n. 31 (D.C. Cir. 1974). When it "is established that black teachers are so disproportionately assigned to

black schools, the responsible school authorities may fairly be required to demonstrate that such assignments were not racially motivated." Board of Ed., Cincinnati v. Department of H.E.W., 396 F.Supp. 203, 232 (S.D. Ohio 1975), rev'd on other grounds, 532 F.2d 1070 (6th Cir. 1976). See Adams v. Weinberger, 391 F.Supp. 269, 271 (D.D.C. 1975).

Raw statistics are not necessarily dispositive if there is evidence showing lack of intent to discriminate. In Kelsey v. Weinberger, supra, where H.E.W. tried to grant ESAA funding, it argued that racial identifiability of faculties, standing alone, does not demonstrate racial discrimination within the meaning of the Act. As noted above, the District of Columbia Circuit modified this position, holding that statistical disparity makes out a prima facie case of discrimination. However, in Robinson v. Vollert, 411 F.Supp. 461, 477 (S.D. Tex. 1976) where H.E.W. attempted to deny funding, it took the position that "the mere existence of a significant statistical disproportion of itself rendered [the Galveston Independent School District] ineligible."

Robinson involved 20 U.S.C. § 1605(d)(1)(D), which provides that a school district is not eligible for ESAA funds if it has

> . . .had in effect any other practice, policy, or procedure, such as limiting curricular or extra-curricular activities (or participation therein by children) in order to avoid the participation of minority group children in such activities, which discriminates among children on the basis of race, color, or national origin. . . .

This provision is closely related to section 1605(d)(1)(B), the section at issue in the instant case. The Court's response to H.E.W. in Robinson is therefore of considerable significance in construing section 1605(d)(1)(B). The Robinson court flatly rejected H.E.W.'s position that non-statistical data is irrelevant:

> The Court is of the view that that interpretation reads section 706(d)(1)(D) too broadly. Section 706(d)'s language makes clear that it was aimed at specific forms of discrimination that may occur even in perfectly proportioned systems.

Id.

The relevant statute, regulations and cases indicate a failure of H.E.W. Before declaring a school board ineligible for ESAA funds, H.E.W. must find either that (1) the school board was maintaining an illegally segregated

school system on June 23, 1972 and it took no effective steps to desegregate after that date or (2) it had a practice after June 23, 1972 that was segregative in intent, design or foreseeable effect. It may rely on statistics alone to make this finding, but it may not ignore evidence tending to rebut the inferences drawn from the statistics.

A school board is entitled to an informal hearing to challenge a finding of ineligibility under ESAA. At a minimum an informal hearing requires the parties to be made aware (1) of the substantive standards that will apply, (2) that evidence submitted relevant to these standards will be considered, and (3) the reason for an adverse decision.

At the November 10, 1977 hearing the government informed the court that defendant Goldberg's rulings of ineligibility did not rest on a finding that (1) a constitutional violation existed in 1972 or (2) changes after 1972 increased the racial identifiability of schools. Defendant Goldbert merely relied upon the 1975-76 statistics. He did not find that after June 23, 1972 the plaintiffs "had or maintained in effect any practice, policy or procedure which results in the. . .assignment of any of its employees." The statute requires such a finding. Before

such a finding can be made, the Constitution mandates that the plaintiffs must have an opportunity to rebut a statistical prima facie case of discrimination.

D. Scope of Review by District Court

This court's power to review an administrative agency's action is circumscribed. To hold unlawful H.E.W.'s action, it must be found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" / (5 U.S.C. § 706(2)(A)); "unsupported by substantial evidence" (Id. § 706(2)(E)); or "unwarranted by the facts" (Id. § 706(2)(F)). Appropriate weight must be given to H.E.W.'s expertise in educational matters. See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814 (1971)(informal agency action generally); Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241(1973)(same); Schicke v. Romney, 474 F.2d 309 (2d Cir. 1973)(same); Board of Education v. Department of Health, Education & Welfare, 396 F.Supp. 203, 211 (S.D. Ohio 1975), rev'd on other grounds, 532 F.2d 1070 (6th Cir. 1976). If "the decision is based on a consideration of the relevant factors" and there was no "clear error of judgment," this court cannot "substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-417, 91 S.Ct. 814, 823-24 (1971). Plaintiffs

have demonstrated defendants' failures sufficiently to require corrective action by the courts.

V. CONCLUSION

The imagination and tenacity with which H.E.W. is enforcing its legal obligation to insure that federal funds are not used to foster racial discrimination in education is admirable. Nevertheless, the enormous power that control of the purse gives the Washington bureaucracy must be exercised with meticulous regard for local rights and the law lest it be used abusively to punish local school boards (and the children they educate) for racial situations the localities do not condone and are seeking to eliminate.

Nothing in the Constitution or ESAA's statute, legislative history, or administrative regulations justifies granting funds on the ground that a discriminatory practice has been beyond the local school authority's ability to control. This purported defense of the Central Board, though poignant in its demonstration of lack of personal blameworthiness, may be unconvincing to H.E.W. The fact that the discriminatory patterns which resulted in correlation of teacher and student assignment by race may have been exacerbated by state statutes and policies

is only relevant if those factors can be shown to be racially neutral. The Central Board is chargeable with discrimination caused by state statutes. H.E.W. could find that the statistical disparities are so grossly disproportionate to what would be expected in a racially neutral system that they represented a practice of discrimination based upon color or national origin in the assignment of teachers.

H.E.W. was not justified in ignoring the contention of the plaintiffs' that its teaching staff was not segregated in 1972 and that it did not discriminate after 1972 in assignment of teachers. Nor was it justified in denying plaintiffs a meaningful opportunity to rebut the statistical case of discrimination. As to these issues plaintiffs have presented evidence warranting a fair, even if informal, hearing and a fair determination.

In view of H.E.W.'s ability to arrive at sound judgments based upon conflicting data and the broad discretion vested in the agency, this is a case in which a decision either way by H.E.W. as to the claims of the Central Board and Local Board 11 would have been possible had proper standards been applied and a proper hearing been held.

Plaintiffs have demonstrated that H.E.W. may not have complied with mandated procedure or applied proper standards. The court, therefore, remands the case to H.E.W. for further consideration.

No costs or disbursements shall be allowed. A stay of this order and a continuance of the prior restraining order for thirty days is granted to permit application to the Court of Appeals.

So ordered.

Dated: Brooklyn, New York
November 18, 1977

U.S.D.J.

APPENDIX IV

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1144-49—September Term, 1977.

(Argued June 19, 1978 Decided September 5, 1978.)

Docket Nos. 78-6035, -6044, -6058, -6066, -6080, -6081

WILLIAM CAULFIELD, *et al.*,

Appellants,

—v.—

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Appellees.

Before:

OAKES and VAN GRAAFEILAND,

Circuit Judges,

and PIERCE,

*District Judge.**

Appeals from orders of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* (1) denying a motion for a preliminary injunction which sought to prevent collection of racial data and (2) remanding case to Department of Health, Education & Welfare (HEW).

Order denying preliminary injunction affirmed. Order remanding case to HEW reversed.

* Of the Southern District of New York, sitting by designation.

MORRIS WEISBERG, New York, N.Y. (Harold Hay, New York, N.Y., of counsel), *for Appellant-Cross-Appellee.*

LEONARD GREENWALD, New York, N.Y. (Gretchen White Oberman, Lewis, Greenwald & Oberman, New York, N.Y., of counsel), *for Intervenor-Appellant-Cross-Appellee.*

JESSICA D. SILVER, Washington, D.C. (Drew S. Days, III, Assistant Attorney General of the United States, Brian K. Landsberg, Cynthia L. Attwood, Department of Justice, David G. Trager, United States Attorney for the Eastern District of New York, Richard P. Caro, Assistant United States Attorney, of counsel), *for Appellee-Cross-Appellant.*

ARTHUR EISENBERG, New York, N.Y. (E. Richard Larson, Carol Ziegler, New York Civil Liberties Union, Robert Hermann, Lita Taracido, Puerto Rican Legal Defense and Education Fund, Inc., of counsel), *for Appellee-Cross-Appellant.*

DORON GOFSTEIN, Assistant Corporation Counsel (Allen G. Schwartz, Corporation Counsel of the City of New York, of counsel), *for Appellee New York City.*

OAKES, *Circuit Judge:*

On this consolidated appeal, the parties challenge two separate orders of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge. The first is an order of February 24, 1978, denying the

motion of plaintiffs-appellants (appellants) who are New York City teachers, principals, community school board officials and parent-teacher association officials, for a preliminary injunction to prevent city, state and federal officials, defendants-appellees (appellees), from collecting data on the ethnic identification of teachers and supervisors. Appellants appeal the denial of the preliminary injunction against data collection. In the second order, dated March 15, 1978, Judge Weinstein sua sponte remanded the case to the Department of Health, Education & Welfare (HEW) for further administrative proceedings to afford appellants and other interested persons the opportunity to participate in the administrative proceeding. The federal appellees have cross-appealed from the order remanding the proceedings to HEW.

With respect to the order denying the injunction against data collection, we hold that the district court did not abuse its discretion in refusing to halt the collection of ethnic data on teachers and supervisors. We further hold that in its second order the district court erroneously remanded the case to HEW for further proceedings. Accordingly, we affirm the district court's order of February 24, 1978, but reverse its order of March 15, 1978.[1]

1 In view of the posture of the case below and the questions certified in the order for appeal under 28 U.S.C. § 1292(b), *see* note 8 *infra*, we do not reach three questions which were not decided on the merits below but are here raised by the appellants. Appellants argue that (1) HEW and the Office for Civil Rights (OCR) do not have power to take action upon allegations that the employment practices of the appellee Board of Education of the City of New York (City Board) discriminated illegally and unconstitutionally against minorities, (2) the City Board's employment practices complained about in a letter of OCR to the City Board dated November 9, 1976, *see* note 3 *infra*, do not constitute illegal and unconstitutional racial discrimination against minorities and (3) the Memorandum of Understanding between the City Board and OCR, *see* note 2 *infra*, and the City Board's actions carrying out its provisions unconstitutionally denied appellants equal protection of the laws by resulting in "reverse discrimination" and deprived them of liberty and property without due process of law.

I. *Background*

At this stage of the proceedings, no facts have been found, no stipulation of undisputed facts agreed upon, no evidentiary record developed. For purposes of the appeal, however, we will rely, as the district court did, on documents appended to various pleadings. These documents reveal that the principal subject of this lawsuit is a September 7, 1977, Memorandum of Understanding (Memorandum) between the Office for Civil Rights (OCR) at HEW on the one hand and the Board of Education of the City of New York (City Board) on the other. The Memorandum obligated the City Board to alter certain teacher and supervisor employment and assignment practices and to remedy the discriminatory effect of those practices on a phased basis by 1980. For its part, OCR agreed that the City Board's promised actions would constitute compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-86.[2]

2 The Memorandum committed the City Board to undertake a number of actions, some of which include:

1. Not later than September of 1979, the teacher corps of each District in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.

2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.

3. The Board of Education will demonstrate to the Office for Civil Rights, subject to prescribed review, that any failure to meet the commitments set forth in paragraphs one and two hereof results from genuine requirements of a valid educational program. In addition, the Board will demonstrate that it has made and is continuing to make special efforts to overcome the effects of educationally-based

(footnote continued on next page)

The process leading up to negotiation of the Memorandum was set in motion on March 18, 1976, when the acting director of OCR wrote to the Chancellor of the City Board to notify him that OCR had received several complaints of discrimination by the City Board against minority teachers. The letter further informed the Chancellor that OCR would conduct a review of employment practices in the New York City school system to evaluate compliance with laws barring discrimination in federally financed programs. Following investigation, OCR informed Chancellor Anker by letter of November 9, 1976, that the City Board was in violation of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681.[3] That letter discussed the

program exceptions through effective use of such mechanisms as recertification, recruitment and special assignment of teachers.

* * * * *

6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor pool by race, ethnicity, and sex by an independent expert acceptable to the parties and pursuant to methodology and standards agreed to by the parties. . . .

It is understood that this commitment shall not require the Board to lay off any teacher currently employed by the Board or to hire any teacher who has not met appropriate requirements for employment, not inconsistent with this agreement. It is further understood that the commitment made herein does not establish quotas. Failure to meet this commitment shall not be considered a violation of this agreement if the Board demonstrates that it has implemented the provisions of this agreement in a good faith effort to meet the commitment made herein.

The Board has advised the Office for Civil Rights that the Board expects to consult with the United Federation of Teachers and others regarding the selection of the independent expert and the standards and methodology to be used in the above study. . . .

* * * * *

3 The letter stated in pertinent part:

With respect to employment practices I have concluded that the New York City school system, in violation of section 601 of the

(footnote continued on next page)

City Board's employment practices, including its discriminatory methods of selection and assignment of teachers, called for submission of a remedial plan, and concluded by offering assistance in preparing the plan. Affidavits on file indicate that, at or about the same time, the OCR director attended a well publicized public briefing at which he explained OCR's findings and invited comments from those in attendance and from the community at large.

OCR's letter of November 9 prompted the establishment of an internal City Board committee to examine OCR's allegations. As part of its study, this committee consulted a number of organizations including some of those participating in this lawsuit as intervenors or amici curiae.[4] On

Civil Rights Act of 1964 (42 U.S.C. [§] 2000d), has, on the basis of race and national origin:

(1) denied minority teachers full access to employment opportunity through the use of racially discriminatory selection and testing procedures and through the use of racially identifiable employment pools in a manner that discriminatorily restricts the placement of minority teachers;

(2) assigned teachers, assistant principals and principals in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools; and

(3) assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students.

I have also concluded that the New York City school system, in violation of section 901 of the Education Amendments of 1972 (20 U.S.C. [§] 1681), has, on the basis of sex:

(1) denied females equal access to positions as principals and assistant principals throughout the system;

(2) provided a lower level of financial support for female athletic coaching programs; and

(3) deprived female teachers of seniority rights and other compensation through failure to eliminate the effects of past discriminatory leave policies.

4 These organizations included the American Jewish Congress, the United Federation of Teachers (UFT), the Council of Supervisors and Administrators (CSA), the NAACP and the New York Civil Liberties Union.

April 22, 1977, before the internal committee had completed its study, the City Board forwarded to OCR its response to the November 9 letter. Without admitting any violation of law, the City Board expressed its determination to rectify "disparate employment opportunities" and proposed an equal employment opportunity plan to "insure equality of opportunity and avoidance of discrimination." The City Board's plan suggested affirmative efforts to increase the number of minority teachers, to improve integration of the teaching staff, and to correct disparities of experience, salary and educational level in the distribution of personnel. The plan also advocated goals for integration of faculty based upon a numerical index, legislative replacement of rank order lists with qualifying lists for teacher selection, and a new system of teacher certification and selection. However, OCR found the plan insufficient and notified the City Board on July 6, 1977, that it was principally concerned with the lack of specificity in the City Board's response. Just prior to OCR's rejection of the City Board's plan, the report of the internal City Board committee (the "Gifford Report") was published. The Gifford Report furnished documentary confirmation of the discriminatory and segregative nature of the City Board's employment practices.[5] This report may well have exerted

5 In part, the Gifford Report summarized its conclusions as follows:

(1) *There is an inexplicable, non-rational disparity between the percentage of minority teachers in the New York City school system and the percentage of minority teachers in 46 other non-southern, urban school systems.*

In order to dismiss or affirm the possibility that the recruitment, selection, and placement practices of the New York public schools contributed to this disparity, we developed a sophisticated econometric model of the social and economic relationships affecting the size of the minority teacher population in New York City and 46 other non-southern, urban cities. The results of the analysis show,

(footnote continued on next page)

some considerable influence in the City Board's ultimate decision to conclude the Memorandum with OCR.

In negotiating the Memorandum, the City Board requested that the United Federation of Teachers (UFT), though not the other parties, be consulted on the terms of the agreement. The UFT was consulted and it agreed to support the adoption of legislation necessary to effectuate the Memorandum. In a press release the City Board hailed the agreement for having been reached "without resort to the courts or other confrontations that might have polarized our city." The release further described the Memorandum as an agreement which carries forward the existing affirmative action program and accepts a "commitment based on applicable standards of law." After the Memorandum was signed but prior to ratification, the City Board held a public meeting on October 19, 1977, with two weeks' advance notice. Thereafter, the City Board ratified the Memorandum by resolution.

in rather stark terms, that the percentage of minority teachers in the New York City public schools is less than one-half of what one would expect to find, if New York City were to "behave" like other cities.

This result, in and of itself, does not constitute proof of discrimination. It does indicate, however, that the percent of minority teachers in the public school system of New York City is far lower than it should be, given the available pool of minority college graduates in New York City and the characteristics of the New York City labor market.

(2) *Minority teachers are channeled into elementary and junior high schools in a manner that corresponds to the racial composition of the schools.*

This finding comes as no surprise since these results were anticipated by the state legislature when it mandated that teachers hired through the alternative method (NTE and "out of rank order" teachers) be restricted to elementary and junior high schools having high concentrations of educationally disadvantaged pupils.

(Emphasis in original.)

On October 31, 1977, the appellants[6] filed this action seeking a declaration that certain provisions of the Memorandum were unconstitutional, illegal and invalid. They also sought an injunction against the enforcement of those provisions and against requiring the appellants to provide data on the ethnic background of teachers and supervisors. Appellants sought summary judgment or a preliminary injunction. After a hearing, the district court by order of February 24, 1978, ruled only on that part of the motion for a preliminary injunction which sought to enjoin the collection of ethnic data and denied relief.[7] A notice of appeal was filed. This court denied an injunction pending appeal but expedited the appeal.

By the same order, the district court sua sponte directed that the pleadings of all plaintiffs be amended to include a claim that their constitutional and statutory rights were abridged by OCR's failure "to afford them and other interested persons the opportunity . . . to participate in the administrative proceedings." The district court then ordered all parties to appear on March 7, 1978, to show cause why the action should not be remanded for OCR's failure to afford such participation. At the March 7, 1978, hearing no party requested a remand but rather each sought to have the proceedings continue in the district court so that the district judge might decide the legality of the Memorandum. However, on March 15, the court ordered the agreement vacated and remanded the case to OCR. It also ordered the City Board relieved of its obligations

6 The district court granted numerous motions to intervene, including those of the UFT, the CSA, several community school boards, the Coalition of Concerned Black Educators, several black teachers represented by the NAACP, Ronald Ross (a black teacher represented by the New York Civil Liberties Union), the Public Education Association, and the American Civil Liberties Union.

7 The district judge stayed his order for 14 days to give appellants an opportunity to appeal.

under the Memorandum, denied all pending motions as moot with leave to renew, and stayed all proceedings pending completion of the administrative hearings on remand. This appeal followed.[8]

II. *Discussion*

A. Denial of the Preliminary Injunction Against Collection of Ethnic Data

Plaintiffs sought to enjoin the mandatory answering of ethnic questionnaires. These questionnaires were distributed to the school system's community school districts. All supervisors and teachers employed in the city's public schools were required to answer questions pertaining to their race, color, sex and national origin. In denying appellants' motion in the February 24 order, the district court made no findings of fact or conclusions of law, although it did note that there is a clear right and obligation of authorities to gather data in order to determine, *inter alia*, whether there has been unlawful discrimination.

This court has recently clarified the standard for issuance of a preliminary injunction: there must be a showing of possible irreparable injury *and* either (1) probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Selchow & Righter Co.* v. *McGraw-Hill Book Co.*, No. 77-7569, slip op. at 3533, 3537 (2d Cir. June 19, 1978); *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976); *see* Mulligan, *Foreword—Preliminary Injunction in the Second Circuit*, 43 Brooklyn L. Rev. 831, 832-33

8 The March 15 order was certified in accordance with 28 U.S.C. § 1292(b). This court granted petitions for leave to appeal and cross-appeal and consolidated the appeal from the March 15 order with the appeal from the February 24 order.

(1977). Since appellants neither presented nor sought to present any evidence in support of their motion for a preliminary injunction, all that the district court had before it was a question of law. Absent any evidence, the district court could not conclude that the appellants were likely to suffer irreparable injury, much less that the balance of hardships weighed decidedly in their favor. *See Gillespie & Co. of New York* v. *Weyerhaeuser Co.*, 533 F.2d 51, 53 (2d Cir. 1976) (per curiam).

Moreover, appellants have failed to show that they are likely to succeed on the merits. *See id.* They argue, first, that because the agreement between OCR and the Board was vacated by the district court, any racial/ethnic survey to be conducted in conjunction with the Memorandum is invalid. However, they have made no showing that the survey of the ethnic composition of the existing staff of the school system would only be conducted because the Memorandum provided for it. Indeed, for all that appears in the record, this survey is one routinely conducted by the City Board as part of its annual school census.

Appellants also argue that because Title VI does not prohibit racial/ethnic discrimination in employment where providing employment is not a primary objective of federal aid, 42 U.S.C. § 2000d-3,[9] OCR cannot lawfully seek statistics regarding the ethnic and racial composition of the teaching staff. However, appellants have mischaracterized the nature of the OCR investigation. The charging letter of November 9, 1976, specifically noted that its concern with discriminatory employment practices was motivated by the unfortunate effect that these practices exercise on

9 Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3.

minority schoolchildren: "[B]y assigning teachers to schools in such a manner . . . [,] minority children are generally taught by teachers with less experience, lower salary and fewer advanced degrees." Accordingly, OCR's investigation falls within the parameters of 42 U.S.C. § 2000d,[10] and not 42 U.S.C. § 2000d-3, *see* note 9 *supra*, since the objective of OCR's investigation was to alleviate discrimination against minority schoolchildren and not against minority teachers as such.[11] In the context of this OCR investigation, then, the collection of racial and ethnic data is authorized by Title VI.[12] *See United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 882-84 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

Appellant's additional arguments that the proposed census would violate other federal statutes and the Constitution are unpersuasive. The Privacy Act of 1974, 5 U.S.C.

10 No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Id. § 2000d.

11 45 C.F.R. § 80.3(c)(3), which deals with the relationship between 42 U.S.C. § 2000d and 42 U.S.C. § 2000d-3, provides:

Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and non-discriminatory treatment of, beneficiaries.

12 OCR has authority to collect racial data in school systems under the Emergency School Aid Act as well. *See* 20 U.S.C. § 1605(d)(1); 45 C.F.R. § 185.13(*l*); *Board of Education* v. *Califano*, Nos. 78-6083, 78-6088, 78-8120, slip op. at 4527-32 (2d Cir. Aug. 21, 1978).

§ 552a, is invoked but it does not prohibit the collection or retention of such data in this context. Title VI and its regulations authorize the collection of staff data which in turn is permitted to be maintained under 5 U.S.C. § 552a (e)(1).[13] Nor does the Equal Education Opportunities Act, 20 U.S.C. § 1751, prohibit the collection of racial and ethnic staff data.[14] At this stage of the record, where it does not appear whether or not teacher and supervisor assignments in the New York public schools violate Title VI, plaintiffs' assertion that these practices are not violative cannot be taken as fact. Thus any suggestion that OCR's actions are directed at overcoming simple racial imbalance is premature.

Finally, the Constitution itself does not condemn the collection of this data. *Cf. United States* v. *State of New Hampshire*, 539 F.2d 277, 280-82 (1st Cir.) (upholding as constitutional a requirement pursuant to § 709(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c), that the State provide racial and ethnic employee data to the federal government on an EEO-4 form), *cert. denied*, 429 U.S. 1023 (1976). The one-sentence argument that the census produces a Fourth Amendment violation is frivolous; there is no search or seizure here involved. Nor is there a violation of the constitutional right of privacy of teachers and principals within *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), or *Roe* v. *Wade*, 410 U.S. 113 (1973). *See* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. Rev. 670, 673-78, 697-701, 770-72 (1973); *cf. Whalen* v. *Roe*, 429 U.S. 589 (1977) (statute requiring submission of form with patient's name to State Department of Health in case of certain prescription drugs not unconstitutional); *Schachter* v. *Whalen*, No. 78-7154, slip op. at 4001 (2d Cir. July 19, 1978) (statute granting power to subpoena medical records from doctor under investigation by State not unconstitutional).

13 Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President[.]

5 U.S.C. § 552a(e)(1).

14 No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

20 U.S.C. § 1751; *cf. Darville* v. *Dade County School Board*, 497 F.2d 1002, 1004-05 (5th Cir. 1974) (20 U.S.C. § 1651, which is identical to 20 U.S.C. § 1751, does not foreclose school assignment plans voluntarily adopted by school board which exceed constitutional minimums and the means, such as transportation, to carry out the plan).

B. District Court Remand to HEW

The federal appellees, as cross-appellants, argue strenuously that the district court erred in sua sponte remanding the case to HEW.[15] We agree.

15 Cross-appellants contend that the district court erred in raising and deciding a claim for relief not made by any party on the ground that there was no case or controversy. Since none of the parties except CSA raised any procedural question and since CSA itself did not specifically seek the remand to HEW which the district court ordered, cross-appellants argue that the propriety of the remand has not been presented in an adversary context. *See O'Shea* v. *Littleton*, 414 U.S. 488, 493 (1974); *Jenkins* v. *McKeithen*, 395 U.S. 411, 423 (1969) (Marshall, J.); *Flast* v. *Cohen*, 392 U.S. 83, 96-97 (1968). We are persuaded, however, that the requisite case or controversy exists. Even though CSA did not in haec verba request the district court to remand the case to HEW, CSA did ask that the Memorandum be held illegal for not permitting its participation; and CSA was careful to pray for such relief as the court deemed proper. *See Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802-03 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006, 1007 (1972); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2664, at 108-09 (1973); Fed. R. Civ. P. 54(c). In addition, at this stage in the proceedings, CSA has explicitly argued that the remand to HEW was proper. Consequently, the district court had and this court has jurisdiction to decide the question of the remand to HEW.

Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1,[16] provides for three types of action to secure compliance with the substantive provisions of Section 601, 42 U.S.C. § 2000d:[17] (1) refusal to grant or termination of assistance, (2) other means authorized by law such as a reference to the Department of Justice, 45 C.F.R. § 80.8(a),[18] and (3) voluntary means. Where the agency seeks to compel compliance through termination of funds or other means, Section 602 requires that the agency proceed by formal means including an administrative hearing at which a record is made. Before doing so, however,

16 Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. . . .

42 U.S.C. § 2000d-1.

17 *See* note 10 *supra.*

18 If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

45 C.F.R. § 80.8(a).

HEW must attempt to secure compliance by voluntary means. 42 U.S.C. § 2000d-1; *see* note 16 *supra.*[19]

While HEW's regulations specify a variety of procedures to effectuate fund termination,[20] they do not provide for

19 Congress's intent that HEW use voluntary means to secure compliance with Title VI before resorting to fund termination is clear. Senator Humphrey stated that

> [t]he first step, in all cases, will be advice to the appropriate person or persons and a reasonable effort to secure voluntary compliance. Obviously no hearing is required in connection with such efforts at voluntary compliance.

110 Cong. Rec. 8979 (1964). And Senator Ribicoff added:

> The agency could not immediately cut off the funds. As I view this matter, I hope that in the case of every agency and every county involved the officials of the agency would sit down with the officials of the county and would try to settle the problems voluntarily, before any action would be taken, including action to cut off funds, which would be the last resort.

110 Cong. Rec. 13129 (1964).

20 (c) . . . No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. . . .

(d) . . . No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

45 C.F.R. § 80.8(c)-(d).

(footnote continued on next page)

public participation or a hearing when HEW acts infor-

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. . . . An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver . . . .

(b) *Time and place of hearing.* . . . Hearings shall be held before a hearing examiner . . . .

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence . . . .

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for

(footnote continued on next page)

mally.[21] In addition, pursuant to Executive Order 11764 of January 21, 1974, granting the Attorney General authority to prescribe standards and procedures for Title VI enforcement, the Attorney General has adopted regulations which provide simply that any agreement to "take remedial steps . . . shall be set forth in writing by the recipient and the federal agency[,] . . . specify the action necessary for the correction of Title VI deficiencies and . . . be available to the public." 28 C.F.R. § 42.411(b). No other procedures, such as a hearing or public participation, are required. These regulations are entitled to some weight in construing the meaning of Title VI. *See Lau* v. *Nichols,* 414 U.S. 563, 566-69 (1974); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

Because HEW did not seek compliance by fund termination, but rather by a voluntary agreement, HEW was not required to afford cross-appellees an opportunity to participate. The action taken here to effect compliance was precisely the type of action contemplated by Congress in using the phrase "voluntary means." 42 U.S.C. § 2000d-1; *see* note 16 *supra.*

Nevertheless, the district court held that participation was mandatory on the basis that the agreement was not voluntary. The principal reason for the district court's finding of involuntariness was that the City Board, along

the record. All decisions shall be based upon the hearing record and written findings shall be made.

* * * * *

45 C.F.R. § 80.9(a)-(d).

21 (d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

45 C.F.R. § 80.7(d)(1).

with the City as a whole, was in the midst of a fiscal crisis and presumably could not afford a fund termination while it litigated the issue of Title VI compliance. But the only fund termination sought by HEW related not to Title VI funds but to Emergency School Aid Act funds.[22] To be sure, a threat of potential fund termination lurked in the background since without such leverage voluntary compliance might possibly never be achieved. And after all, if there is lack of compliance, HEW is obligated to enforce the statute ultimately by terminating funds. *Adams* v. *Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973).[23] Undoubtedly then there is a certain amount of coercion inherent in the enforcement scheme. *See United States* v. *Jefferson County Board of Education, supra*, 372 F.2d at 856 (quoting Report of the United States Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States—1965-1966*, 2).

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22 *See Board of Education* v. *Califano, supra.*

23 *See* Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1772-73 (1975):

> The resource and delay costs of formal proceedings are incurred by the agency as well as private parties and may seriously undermine the effective discharge of agency responsibilities. These burdens will mount as previously informal decisions on enforcement policies are subjected to formal processes of resolution. Increased procedural formalities may work to the disadvantage of public interest groups by exhausting their limited resources and providing organized interests a basis for delaying agency enforcement actions. Moreover, formal trial-type proceedings in many contexts may be inferior to informal negotiations as a means of agency dispute resolution and decision-making. The complex scientific, technological, social and economic issues presented in so much of current administration are often ill-suited for resolution by adjudicatory procedures that produce gargantuan records whose size "varies inversely with [their] usefulness." Judicialization of agency procedures and the expansion of participation rights may also aggravate the tendency for the agency to assume a passive role, focusing on the unique character of each controversy in order to reach an ad hoc accommodation of the particular constellation of interests presented.

(Footnotes omitted.)

Undercutting any actual coercion, however, are several points. The City Board's own study, the Gifford Report, confirmed the conditions cited in the November 9 letter from OCR. Moreover, the City Board's press release indicated that the agreement had been reached in a spirit of cooperation. And of course, the lack of participation by the Council of Supervisors and Administrators (CSA) cannot render a voluntary agreement involuntary. The City Board's commitments under the Memorandum, despite its impact on teachers and supervisors, came about by the City Board's decision to comply with OCR's interpretation of Title VI, not by any fund-termination action by OCR. *Cf. Maher* v. *Roe*, 432 U.S. 464, 475-76 & n.9 (1977) (distinction between direct "interference with a protected activity and . . . encouragement of an alternative [permissible] activity"). In addition, there was ample opportunity to communicate with the City Board between the time the terms of the agreement became publicly known and the time of its ratification, but no party, including CSA, sought to participate during that hiatus, although most parties were consulted in the interim.

In any event, the statutory scheme requires a hearing with notice only when HEW seeks fund termination. *See Board of Public Instruction of Palm Beach County* v. *Cohen*, 413 F.2d 1201, 1202-03 (5th Cir. 1969). Where, as here, Congress has determined what procedures shall be required in effecting compliance with Title VI, the courts may not override that determination simply because they believe other procedures would be preferable. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 46 U.S.L.W. 4301, 4308 (U.S. Apr. 3, 1978).

Order denying preliminary injunction on collection of racial/ethnic data affirmed; order remanding to HEW for administrative proceedings reversed; cause remanded to the district court for hearing on the merits.

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APPENDIX V

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

BOARD OF EDUCATION :

-against- : 77 C 1928

CALIFANO :

----------x

United States Courthouse
Brooklyn, New York
September 27, 1978
9:30 o'clock a.m.

Before:

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

NICHOLAS IANNELLI
ACTING OFFICIAL COURT REPORTER

EASTERN DISTRICT COURT REPORTERS
UNITED STATES DISTRICT COURT
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201
[illegible]

Appearances:

JOSEPH BRUNO, ESQ.
GREGG MASHBERG, ESQ
Corporation Counsel
Attorneys for the Plaintiff

RICHARD CARO, ESQ.

Attorney for the Defendant
United States of America

THE CLERK: Civil motion, Board of Education versus Califano.

MR. BRUNO: Joseph Bruno.

MR. CARO: Richard Caro.

THE COURT: Yes.

MR. BRUNO: I asked for this conference, Judge. We do not have any papers in front of you on our most recent application, but as you know, the Board of Education v. Califano dealt with the 1977-78 application.

We have now the '78-79 application, where we approximate 6.1 million. We're in the same position we were when we came in on the last case.

We have a rejection letter from HEW which in essence sets forth the same grounds that we had in the prior application.

The main ground that still is left -- at least unresolved, anyway -- is the assignment issue, essestially issues that were involved in the Board of Education versus Califano. We appealed that case, and as the Court knows, we had a decision from the Second Circuit. We filed a petition for rehearing which grants to us a stay of the issuance of the mandate from the Second Circuit.

THE COURT: I was wondering why the mandate hadn't ckome down.

MR. BRUNO: Beyond that we are seeking a waiver of ineligibility from HEW which has not been denied but we've been advised by telephone yesterday from Washington that it will be denied.

Essentially HEW's position is that unless we're in absolute compliance they cannot waive an ineligibility. I'll present papers tomorrow but I thought it might be wise to do this today. Tomorrow is the last day -- to attempt to stay any dismissment of the funds which we think may come to the City. There is no fund set for the City right now but we have an application and we'll be asking that the Court essentially put this case in with the Board of Education re Califano, at least grant us a stay until we have a decision on the application from the Second Circuit, and I would add that we intend to file a petition for cert on the Second Circuit opinion when they deal with the constitutional test --

THE COURT: It's a very important case.

MR. BRUNO: All we are asking the Court to do at this point, at least preserve our potential

for receiving funding for 1978-79 year. This is a significant amount of money to us and with the situation we have with the Board of Education this would seriously curtail some of the programs that we run.

THE COURT: It's a very serious case and I understand your position, but in the original Board of Education v. Califano, 77-C-1928, an allocation had already been made. Here that hasn't been done.

MR. CARO: That is not true. There was no allocation.

THE COURT: Set aside. They decided you were entitled to it if you met the requirements, isn't that so?

MR. CARO: In the original one, yes, sir.

THE COURT: Now here you haven't even gotten to that point, isn't that right?

MR. BRUNO: I believe we're at the same position as in the prior one. Essentially the same thing. They are considering our application as they were in the 1977 application and they indicated we were ineligible for three reasons.

THE COURT: You would have gotten the 6.1 --

MR. BRUNO: We don't know what we would get.

THE COURT: In the other case they actually set aside funds for you.

MR. BRUNO: I think your letter of July 13th indicates that we did not have a specific fund.

MR. CARO: Yes, that is what I was advised at the time.

MR. BRUNO: We're in the same situation we were then. were then.

MR. CARO: The corporation counsel submitted to the Court of Appeals the '77-78 -- data underlying the '77-78 data with the denial of the '77-78 application, and the new statistics on that to the Court of Appeals. I advised the Court of Appeals, for example, with the statistics dealing with -- in response to their submission dealing with the high schools -- that notwithstanding the implementation that did take place, the memorandum of understanding with respect to the high schools, the racio-ethnic disparity in faculty had worsened in some of the cited high schools, for instance Forest Hills, unchanged; James Madison High School, the new schools within that category were added to the list.

The Second Circuit in commenting on the new data with respect to District 11 stated in footnote 31,

while HEW removed one school from this unsatisfactory list, the other three remained racially identifiable and three additional schools were deemed in violation of EISA criteria.

In another place they commented that there was a regression in the situation and it seems to me, notwithstanding the question of whether the Court has any jurisdiction to grant any relief, absence the filing of a complaint, perhaps the most appropriate thing at this point would be a denial of a TRO and denial of preliminary injunction, and allow them to ask the Second Circuit to grant them this stay.

MR. BRUNO: I will submit papers to the Court tomorrow morning.

THE COURT: I'll do that. I'll deny it. From a procedural point of view it's in an awkward position. It's true there hasn't been a remand yet. In that respect, since no order of this Court has issued I think collateral estoppel to the extent it's applicable doesn't apply yet. There is no final judgment.

On the other case, stare decisis does apply because the last statement of the higher court binds this court. The net effect is identical so

far as the parties to this litigation is concerned, and I have no alternative but to deny -- I would think -- a temporary restraining order and the preliminary injunction.

MR. BRUNO: All right.

THE COURT: I am bound by the Second Circuit decision.

MR. BRUNO: I would --

THE COURT: I think it's unfortunate.

May I see the decision?

MR. CARO: Yes.

(Whereupon the same was handed to the Court.)

THE COURT: I think it's unfortunate that what I consider now to be one of the most important decisions in school cases has been made by a Court of Appeals with only one Circuit Judge in effect deciding the major issue of constitutional and statutory law.

With all due respect to Judges Blumenfeld and Mahrtens, a matter of this great importance should not be in my opinion determined by one Circuit Judge. Not only is a grave constitutional issue involved, but a very serious problem of the relationship of a major administrative agency to

local school authorities is implicated.

The net result of a number of the Second Circuit decisions over the last few months has been, first, that the substantive rule permitting the administrative agency to withhold funds has been greatly broadened so that instead of the narrower or constitutional standard set forth by the Supreme Court, this extremely broad substantive standard applied by New permits withholding of funds.

I take no objection to that -- it may be sound law and I indeed find it a desirable substantive rule -- but it's a very major decision that implicates the dispersements of hundreds of millions of dollars and may affect the well-being financially of many school districts and many local municipalities.

That, taken with the further decision of the Second Circuit in Caulfield, C-A-U-L-F-I-E-L-D, decided --

MR. CARO: September 6th.

MR. BRUNO: I have it here.

(Whereupon same was handed to the Court.)

THE COURT: September 5, 1978. Two Circuit Judges and one District Judge. It has a combined implication of great importance. In Caulfield in

effect it was held that the threat of withholding of funds did not constitute sufficient coercion to make nonvoluntary for statutory purposes an agreement entered into between the City and the Federal Government.

The net result of these two cases is to make practically unreviewable any insistence by HEW directed to a unit such as the Board of Education of the City of New York to changes being made in its practices with respect to assignment of teachers.

Under these circumstances, practically, the City has no alternative but to "voluntarily" agree to any conclusions and demands of HEW. Again, this may be a perfectly sound position and this Court has no objection to it, but the combined implications with respect to a shift of power from the Courts to HEW and from local education authorities, the national educational authorities, is so grave as to warrant full consideration by the appellate courts of this nation.

This Court wishes again to emphasize that it is not in any way criticizing any of the opinions of the Court of Appeals, which it finds personally desirable.

Under the circumstances there is no alternative, I think, but to deny the temporary restraining order and preliminary injunction which will be sought by papers to be filed later today.

I think everybody agrees, don't you?

MR. CARO: Yes.

THE COURT: And don't you?

MR. BRUNO: The only thing I would ask is that I understand the mandate has been stayed. I don't know if -- what effect --

THE COURT: It doesn't -- it has no effect because it's stare decisis. The law of this Circuit is set. It's not a question fo collateral estoppel or res judicata in a technical sense. I am perfectly willing to abide by any decision the higher courts of this country make, but I have no alternative.

MR. BRUNO: I also asked HEW if they would voluntarily stay any disbursement of whatever might be anticipated to be coming to the New York City Board of Education under their 1978-79 grant.

You advised me that they would not do that at this state?

MR. CARO: That's correct.

THE COURT: No, I think since the matter is now

apparently before the Court of Appeals -- what is the situation in Caulfield? Is that before the Court of Appeals?

MR. BRUNO: Not yet.

MR. CARO: No one has filed a petition for reconsideration.

THE COURT: Or for cert?

MR. CARO: Or for cert today.

THE COURT: Have I gotten a remand yet on this case?

MR. CARO: I guess by October 5th, the day before our preconference --

THE COURT: Thank you.

Submit papers and try to consent to the form. I'll sign them this afternoon or tomorrow morning. I think really the Second Circuit should grant the stay here. I feel my hands are tied.

MR. BRUNO: Thank you.

MR. CARO: Thank you very much.

(Whereupon matter was adjourned for this date.)

* * *

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-873

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

—against—

JOSEPH A. CALIFANO, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 30, 1978
CERTIORARI GRANTED FEBRUARY 20, 1979

INDEX

PRINTED IN APPENDIX TO
PETITION FOR CERTIORARI

Relevant Docket Entries

UNITED STATES DISTRICT COURT

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, IRVING ANKER, Chancellor of the City School District of the City of New York; COMMUNITY SCHOOL BOARDS OF COMMUNITY SCHOOL DISTRICTS 1, 7, 9, 11, 12, 13, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29, and 30, 32,

Plaintiffs,

—against—

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, HERMAN R. GOLDBERG, Associate Commissioner, Equal Educational Opportunity Programs, United States Department of Health, Education and Welfare; DAVID S. TATEL, Office for Civil Rights, United States Department of Health, Education and Welfare,

Defendants.

28 USC 1346

Application for a preliminary and permanent injunction against denial of pltff's application for funds under the Emergency Cause School Aid Act, 20 USC 1601 et seq. & 45 CFR 185.01 et seq.

SEEKS—$17.5 million

For Pltff.:
W. BERNARD RICHLAND
Corporation Counsel
Municipal Building
NY, NY 10007
(566-2183/2192)

by Rosemary Carroll

Relevant Docket Entries

DATE	PROCEEDINGS
9-27-77	Complaint filed, summons issued.
9-29-77	By WEINSTEIN J.—Order to show cause filed returnable 10/6/77 at 4:00 p.m. for an order why an order should not issue rescinding defts denial of pltff's application for funding under the Emergency School Aid Act and declaring such denial to be violative of that act, etc. tk
10- 3-77	Letter dtd 11/9/76 filed re OCR to Chancellor Anker filed. jj
10- 3-77	Memo of understanding between Bd of Educa. and the OCR office filed. jj
10- 3-77	Pltff's exhibits in support of preliminary injunction filed. jj
10- 6-77	Before Weinstein, J—case called trial adjd to 10/31/77, jj
10- 7-77	By WEINSTEIN, J.—Consent order dtd 10-6-77 filed that parties will move for summary judgment on 10-31-77 and that TRO shall remain in full force until decision on the motion. ld
10-31-77	Before Weinstein, J.—Case called. Both sides present. Pltff's motion to to strike deft exhibits 13, 14, 18, 19, 20, & 21 from administrative record denied. Govt's motion for summary judgement argued and granted. Court grants city's motion for summary judgement as to District 11. Dist. 11 to furnish such such supplemental information that HEW may require. TRO continued and extended 10 Days. If court decides against city on submission of briefs, judgement to be stayed pending city's appeal. Govt to submit order. jm

Relevant Docket Entries

DATE	PROCEEDINGS
10-31-77	Pltff's response to deft's 9G statement and deft's 9G statement filed, dtd 10/30/77. jm
10-31-77	Affidavit of R. Carroll, filed. jm
11- 1-77	By WEINSTEIN, J.—Order dtd. 10-31-77 that pltff's motion for summary judgment is granted and that defts motion for summary judgment is granted and that the TRO dtd. 10-6-77 is hereby extended 10 days from date of this order and that a motion for reconsideration may be made within 10 days of this order filed.
11- 3-77	Affidavit in support of defts motion for summary judgment filed.
11- 3-77	Notice of motion ret. 10-31-77 for summary judgment with memo of law filed.
11- 3-77	Notice of motion ret. 10-31-77 with affidavit of D. Tatel, N. Cicchetti and rule 9 g statement filed, with exhibits attached filed fy
11- 7-77	Memo of law in support of defts motion for summary judgment filed. fy
11-10-77	Before WEINSTEIN, J.—Case called for hearing. Hearing held and TRO extended pending decision of Court fy
11-17-77	Letter dtd 11-14-77 to J. Weinstein from Rosemary Carroll re typographical error in the Cicchetti affidavit of 11-9-77, paragraph 4 filed. mg

DATE	PROCEEDINGS
11-18-77	By WEINSTEIN, J.—Memo and order remanding the case to HEW for further consideration and no costs or disbursements are to be allowed and a stay of this order and a continuance of the prior restraining order for thirty days is granted to permit application to the Court of Appeals filed. fy
11-22-77	Stenographers Transcript dated 11/10/77 filed.
12-19-77	Letter of Rosemary Carroll (Asst. Corp. Counsel) to WEINSTEIN, J. dtd 12/16/77. IN RE: Hearing on the BOARD's application will be held on 1/3/78 pursuant to YOUR decision and Order of 11/18/77 filed. lg.
12-21-77	Before WEINSTEIN, J.—Case called. Hearing held on order to show cause. Court ruled that City can provide its own court reporter for administrative hearing before H.E.W.—Stay continued until five days after HEW makes its determination. mm
12-22-77	By WEINSTEIN, J.—Order to show cause ret 12-21-77 filed. mm
12-22-77	Letter from Richard P. Caro dtd 12-19-77 filed. mm
12-27-77	By WEINSTEIN, J.—Order dtdl 12-23-77 restraining deft from distributing 3.8 million dollars in ESAA funds etc., see order filed. fy

DATE	PROCEEDINGS
4-11-78	By WEINSTEIN, J.—Order to show cause ret 4-12-78 at 2 PM for an order rescinding deft's denial of pltffs' application for funding, etc without TRO and without proof of service filed. Amended complaint filed. fy
4-12-78	NYC's memo of law in support of application for perliminary injunction filed. fy
4-12-78	Before WEINSTEIN, J.—Case called. Pltff's motion for TRO argued a denied. On application of govt., motion for summary judgement Gr Orde-r stayed until tues 4/18/78 @ 5 PM to permit time to appeal. jm
4-14-78	Letter dtd. 4-13-78 from R. Carroll to J. Weinstein re: notice of settlement for 4-18-78 filed. fy
4-18-78	Declaration of USA with documents attached re: added to administr record filed. fy
4-19-78	By WEINSTEIN, J.—Order dtd 4/18/78 denying pltff's application for TRO and for judgement reversing defts decision finding pltffs ineligible for ESAA funds, and other relief, etc, etc, see order filed. jm (clerk directed to enter judgement)
4-21-78	Judgment dtd. 4-20-78 granting judgment to the defts etc., see j filed. fy
4-21-78	By WEINSTEIN, J.—Order extending stay of order dtd. 4-18-78 to 4-21-78 at 5:00 P.M. filed. fy

Relevant Docket Entries

DATE	PROCEEDINGS
4-20-78	Notice of appeal filed by plttfs filed. copies mailed. fy
4-21-78	Sten. transcript dtd. 4-12-78 filed. fy
4-21-78	Letter dtd. 4-17-78 from R. Carroll to J. Weinstein re: defts proposed order filed. fy
4-21-78	Unsigned order filed. fy

Letter to Chancellor Anker Dated 11/9/76

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
Washington, D.C. 20201

November 9, 1976

Chancellor Irving Anker
Board of Education of the
City of New York
110 Livingston Street
Brooklyn, New York 11201

Dear Chancellor Anker:

The purpose of this letter is to advise you that the Office for Civil Rights has concluded that portion of its compliance investigation of the Board of Education of the City of New York relating to the employment practices of the school system. On the basis of this investigation, which included an evaluation of specific complaints filed with this Office over a period of years alleging employment discrimination by the school system, I have concluded that the New York City school system is in noncompliance with both Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. This office will advise you of its compliance determinations with respect to the balance of the matters under investigation as part of Equal Educational Services Review by the end of January 1977. These actions are consistent with the recent order of the United States District Court in *Brown v. Mathews,* Civil No. 75-1068 (D. D.C. September 20,

1976), which requires this Department to expeditiously complete certain outstanding investigations.

With respect to employment practices I have concluded that the New York City school system, in violation of section 601 of the Civil Rights Act of 1964 (42 U.S.C. 2000d), has, on the basis of race and national origin:

(1) denied minority teachers full access to employment opportunity through the use of racially discriminatory selection and testing procedures and through the use of racially identifiable employment pools in a manner that discriminatorily restricts the placement of minority teachers;

(2) assigned teachers, assistant principals and principals in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools; and

(3) assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students.

I have also concluded that the New York City school system, in violation of section 901 of the Education Amendments of 1972 (20 U.S.C. 1681), has, on the basis of sex:

(1) denied females equal access to positions as principals and assistant principals throughout the system;

(2) provided a lower level of financial support for female athletic coaching programs; and

(3) deprived female teachers of seniority rights and other compensation through failure to eliminate the effects of past discriminatory leave policies.

Discussion of Title VI Violations

(1) *Access to Employment*

The United States Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), held that where the application of an employment test or criterion resulted in an adverse impact on the employment opportunities of minorities, such test or criterion must be considered racially discriminatory unless an employer demonstrates that the test or criterion is "job-related" or "business necessary". Even if a test or criterion is found to be job-related or business necessary, it may not be used if a reasonable alternative system with a lesser differential racial impact exists. (See *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971).) Although the court in *Griggs* specifically addressed Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), the court indicated that its holding was applicable to employment discrimination in general. Accordingly, the Department applies the *Griggs* standard to employment discrimination which arises under Title VI of the Civil Rights Act of 1964.

A. *Hiring Methods*

Since 1968, the District has routinely collected data concerning the racial and ethnic composition of the system's teachers and student body. This information indicates that the percentage of minority teachers employed by the school system during this time period has never exceeded 15 percent of the total teachers in the system. (See Appendix A.) Specifically, data provided to the State of New York as part of the Basic Educational Data System (BEDS) for fall 1975 indicates that across the system 14.3 percent

of the teachers assigned to elementary schools were minority, the minority teacher composition of junior high/intermediate schools was 16.7 percent and the minority teacher composition of high schools was 8.3 percent. (See Appendix B.) More recent data collected by the school system for the Federal government in the spring of 1976 confirms this basic distribution. During the same school year (1975-76), the composition of elementary school students across the system was 69.7 percent minority; junior high/intermediate schools, 70.1 percent minority; and high school, 62.6 percent minority. (See Appendix B.)

This obvious disparity between the percentage of minority teachers and the percentage of minority students in the New York City school system is not consistent with the situation in other large urban school systems throughout the country. Attached at Appendix C is a table showing the racial composition of students and teachers in other such systems. This disparity, coupled with specific allegations of racial discrimination in the hiring practices of the school system, led this Office to investigate the recruitment, testing, selection, licensing and assignment practices of the school system.

As a result of the investigation of these issues, it became apparent that the New York City school system has organized its teacher hiring process into two racially identifiable components. The first component is a series of "rank order" lists promulgated for each subject matter license area by the Board of Examiners, containing the names and scores of those persons who passed a Board of Examiners examination in each license area. These persons are eligible for employment city-wide and are given

employment preference based first on the date the list is promulgated by the Board of Examiners, and second on the numerical test score attained by each applicant.

The second component, referred to as the "alternative method," establishes a hiring pool from which teachers may be selected by some but not all of the system's schools. Under this method, persons may be selected either (1) by being taken out of rank order from the existing rank order lists or (2) by achieving a minimum score (as determined by the Chancellor) on the National Teachers Examination (NTE). This method does not require that preference be given by date of examination or score attained.

In addition, the system divides its schools into two categories for teacher hiring purposes. One group includes (1) all high schools and special schools and (2) certain elementary and junior high/intermediate schools. To determine which elementary and junior high/intermediate schools are included in this group, all elementary and junior high schools in the system are listed in order by the proportion of students in the school who are reading at or above grade level. Those elementary and junior high schools above the 45th percentile on such list ("the non-45th percentile schools") are included in this group. All those elementary and junior high schools at the 45th percentile or below comprise the second group of schools ("the 45th percentile schools"). Schools in the first group may hire teachers in order of rank from the promulgated lists and are precluded from hiring teachers through the "alternative method." Schools in the second group may hire teachers either from the rank order list *or* through the alternative method.

Information provided by the school system shows that the percentage of minority teachers hired on the basis of the National Teachers Examination (one option of the alternative method) is at least four times the percentage of minority teachers on the rank order list. (See Appendix D.) Thus, our investigation reveals that the rank order process dramatically excludes a large number of qualified minority teachers from employment opportunities in a majority of the district's schools, i.e., the high schools, special schools, and the non-45th percentile schools.

The racially identifiable group of teachers who are selected as a result of the alternative method are restricted to 45th percentile schools, which are themselves racially identifiable. The student racial composition of the 45th percentile schools has exceeded 91 percent minority since the alternative hiring method was implemented for the 1971-72 school year. (See Appendix E.) As a result, many minority teachers are not only excluded from full employment opportunity in the non-45th percentile schools but are also channeled to schools in a manner that directly corresponds to the student racial composition of the schools.

The small numbers of minority teachers employed by the system have been reduced by the recent lay-off actions. While these actions have not disproportionately affected minority teachers who did enter the system, the school system's decision to decrease the numbers of minority teachers has only exacerbated the problem created by the exclusionary hiring process.

Therefore, I have concluded that the use of separate hiring pools discriminatorily restricts the access of minority teachers to full employment opportunity in the New York City school system and violates Title VI.

B. *Testing*

In addition to the employment restrictions imposed by the alternative method, the process used by the Board of Examiners to generate the rank order lists and to make other employment eligibility decisions represents a separate discriminatory barrier to minority teacher employment.

There are three distinct but related aspects of the rank order method, each of which has an adverse impact on the hiring of minority applicants:

(1) the date the examination is given;

(2) the pass/fail score achieved on a particular examination; and

(3) the numerical score above passing attained by the applicant on a particular examination.

The use of "date" as a criterion for selection has an exclusionary effect on minority applicants. This is illustrated by the chart attached at Appendix F which shows that for the largest licensing areas, both the number and percentage of minority applicants who took and passed the test have steadily increased year by year. For example, the percentage of blacks among those who passed the Common Branches examination quadrupled between 1968 and 1974 from 2 percent to 8.4 percent as the number of blacks passing the test has increased from 5 to 272. Consequently, the requirement that earlier lists be exhausted before anyone on a later list can be considered creates a constraint on minority employment opportunity. There does not appear to be any business necessity or educational justification for this requirement.

Data supplied by the school system also reveal that the pass/fail criterion established by the Board of Examiners has an adverse impact on minority applicants. The percentage of minority applicants who took and passed the examinations in the largest licensing areas in the years for which data was supplied was significantly lower than the corresponding percentage of non-minority applicants. For example, in the June 1974 Common Branches Examination, 28.5 percent of all blacks who took the test passed, while 65.8 percent of the other applicants taking the test passed. (See Appendix G.)

Similarly, the use of rank order for those passing has an adverse impact on minority employment opportunities. Our review of several different test results, based upon those given in the largest licensing areas, clearly indicates that minority applicants passing the examination consistently were overrepresented in low score categories and underrepresented in high score categories. (See Appendix H.) In the absence of a showing that scores on the Board of Examiners examination are correlated with job performance, this disparity, under the *Griggs* test, violates Title VI.

In addition to the tests used for establishing rank order lists, the pass/fail criterion created by the Board of Examiners for the recertification examinations and the ancillary certificates also poses a barrier to the employment of minorities. In each of the recertification examinations for which the Board of Examiners provided data, the results of the tests demonstrated a disparate impact on blacks. For example, on the January 1976 Math junior high school examination, the pass rate was 47.62 percent for blacks and

76.46 percent for whites. (See Appendix I.) The results of the ancillary certification process show a pattern identical to the recertification examinations. As an example, the results of the June 1975 Early Childhood examination show that the pass rate was 14.29 percent for black and 26.26 percent for whites. (See Appendix J.)

On the basis of the information we have reviewed during our compliance investigation, we have concluded that the test date, the pass/fail score and the rank order list by numerical score each has an adverse impact on minorities. The use of the test date as a measure of the qualifications of minority applicants is neither job related nor business necessary, and the school system has yet to demonstrate the job-relatedness or business necessity, because there are teacher hiring methods readily available to the system which have a less adverse impact on minorities. One of these, the alternative hiring method described above, has been utilized by the system for several years. Another available method is the use of New York State certification as the basic criterion for teacher employment. In order to comply with Title VI, the school system would have to use that hiring method reasonably available to it which has the least adverse racial impact.

(2) *Assignment of Teachers, Principals and Assistant Principals*

This Office has found a significant correlation between the race/ethnicity of professional staff (composed of principals, assistant principals and teachers) and the race/ethnicity of the students in the schools to which the staff are assigned. The statistical strength of the relationship

demonstrates that this assignment pattern is not a random occurrence.

Specifically, minority professional staff are assigned predominantly to minority schools and are rarely assigned to those schools in the system which are predominantly white. For example, 82 percent of all minority teachers are assigned to schools where minority student enrollment exceeds 84 percent, while less than 15 percent of all minority teachers are assigned to those schools where minority student enrollment is below 35 percent. A similar assignment pattern is found for minority assistant principals and principals at the elementary, junior high/intermediate, and high school levels. Spanish-surnamed principals, assistant principals and teachers are concentrated in schools with the highest percentages of Spanish-surnamed students; and black principals, assistant principals and teachers are concentrated in schools with the highest percentages of black students. (See Appendix K.)

In addition to analyzing system-wide assignment patterns, this Office reviewed the assignment of professional staff within each of the thirty-two community school districts. In nearly all community school districts where there are schools with sufficiently varied student racial/ethnic compositions to permit the schools within the district to be characterized as both "minority" and "non-minority," the race/ethnicity of teachers assigned correlates significantly with the student racial/ethnic composition of those schools. Specifically, this pattern was found to exist in Community School Districts 3, 6, 10, 11, 14, 18, 21, 24, 27, 28,* 29, and 31.

* CSD 28 was previously advised of its ineligibility for participation in the ESAA program due to its discriminatory assignment of teachers to schools. This violation is also a violation of Title VI.

In Community School Districts 2, 15, and 30, analysis of the assignment pattern does not produce a statistically significant result. In Community School Districts 1, 4, 5, 7, 8, 9, 12, 13, 16, 17, 19, 20, 22, 23, 25, 26, and 32, because of statistical considerations, a similar assignment analysis could not be conducted. However, each of these community school districts has directly contributed to the city-wide pattern of segregated staff assignment. (See Appendix L.)

The U.S. Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) stated, at page 18, that:

> Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

Based upon the data supplied by the system, I have concluded that, at the elementary, junior high/intermediate and high school levels, teachers, assistant principals and principals have been and continue to be assigned in a manner that creates, confirms and reinforces the racial/ethnic identifiability of the system's schools in violation of the Supreme Court ruling in *Swann v. Charlotte-Mecklenburg* and, thus, Title VI.

(3) *Salary, Experience and Degree Status of Teachers*

Based on information provided by the school system, our investigation revealed that schools with higher percentages of minority students have been assigned teachers with less

experience, lower salaries and fewer advanced degrees than schools with higher percentages of non-minority students. Specifically, an analysis of 1975-76 BEDS data shows at the elementary, junior high/intermediate and high school levels a significant correlation between the percentage of minority students and the average teacher experience in years, the average teacher salary, and the percent of teachers with advanced degrees. For example, the average salary difference between the teachers in schools with the highest percent minority students and teachers in schools with the lowest percent minority students is about $1100 per year for elementary schools, about $1800 for junior high/intermediate schools, and about $1000 for high schools.

On the basis of this information, I have concluded that the New York City school system has violated Title VI and the Departmental regulation, 45 CFR 80.3(b)(ii) by assigning teachers to schools in such a manner that minority children are generally taught by teachers with less experience, lower salary and fewer advanced degrees.

During the course of this investigation, we have received allegations that Community School District #1 has systematically removed minority principals and teachers and replaced them with white principals and teachers. I am advised that internal grievances have been filed and that hearings have been held to examine certain issues relating to the selection of supervisors in Community School District 1. Members of your staff have indicated that the Hearing Officer has made recommendations and that a decision is expected in the near future. Therefore, this Office will await your decision in this matter before it initiates any action.

Discussion of Title IX Violations

(1) *Access to Supervisory Positions*

According to BEDS data for the 1975-76 school year, women comprised 23.3 percent of all school principals in the New York City school system, and 28.2 percent of all assistant principals. In contrast, in 1975-76, women comprised 60.1 percent of the teaching staff and 57.6 percent of other persons in professional staff positions (guidance, library, health care, etc.), and have historically comprised at least that percentage. (See Appendix M.)

Because supervisory positions are normally filled from the ranks of the teaching staff, this disparity, coupled with specific allegations of discriminatory hiring practices, led this Office to investigate the selection practices of the school system with respect to principals and assistant principals.

In the course of this investigation, it became apparent that the New York City school system has consistently utilized vague and subjective employment criteria and procedures as an important part of the selection process.

The New York City school system hires its supervisors pursuant to the procedures and guidelines set forth in Special Circular No. 30. In addition, the community school districts may supplement these guidelines. Special Circular No. 30 prescribes numerous non-objective hiring standards such as "evidence of receptivity to new concepts and ideas," "general philosophy of education," "sense of humor," "personal maturity," and "warmth and understanding." In various community school districts, vague criteria such as "professional integrity and conscientiousness," "ability to

make decisions and evaluations," and "use of English" have been developed and *added* to the process. The use of vague and subjective criteria has facilitated the development of a sex discriminatory hiring pattern for principals and assistant principals.

The Division of Personnel of the Board of Education of the City of New York has recognized this pattern with respect to the hiring of women in supervisory positions. A May 26, 1976 memorandum from the Executive Director of the Division of Personnel indicates that the reason for this failure is that parent committees involved in the selection process feel that only males can be "tough" or "law and order" principals. The existence of vague and subjective employment criteria clearly creates the opportunity for such sex stereotyping.

The prospects for sex discriminatory selection have been further increased by the continuing failure of the school system to establish and enforce selection procedures which contain feasible safeguards which are necessary to preclude considerations of sex from entering the selection process. For example, the responsibility for monitoring the selection processes of the community school districts is not delineated explicitly and varies considerably among districts.

The consequences of these actions are demonstrated by the wide disparity between the percentage of teachers in the New York City school system who possess the specific qualifications required for principal and assistant principal positions and are women and the percentage of principals and assistant principal positions now filled by women. The minimum New York State requirement for supervisory po-

sitions is a Bachelor's Degree plus 30 semester hours of graduate study and three years experience in education. Of teachers employed by the school system during the 1975-76 school year who met this requirement, 59.7 percent are female. New York State requirements for supervisory positions include the provision that 18 of 30 semester hours of graduate study must be in or related to the fields of administration and supervision. Data is not available as to the sex composition of persons meeting this 18 hour requirement, but even significant variations in this category would fail to explain the existing disparity noted above.

We have also taken into consideration the fact that most of the principals and assistant principals in the New York City school system hold a Master's Degree plus 30 hours of college credit. A review of 1975-76 information indicates that this factor is of little value in explaining the substantial disparity. Of those teachers holding a Master's Degree plus 30 hours of college credit, 47.6 percent are female; of such persons in other professional staff positions, 56.6 percent are female. Thus, on the basis of information available about women now employed as teachers who possess the minimum state certification requirements for principal and assistant principal positions, it is clear that women are underrepresented in such positions by a factor of 2 to 1. A virtually identical under representation of women is observed if the actual qualifications possessed by principals and assistant principals in the New York City schools are used as a basis for comparison. (See Appendix N.)

Not only are women substantially underrepresented in these job categories but the proportion of women principals

and assistant principals employed by the system has actually *decreased* since the passage of Title IX. For example, the percentage of female assistant principals has dropped dramatically from 34.2 percent in 1971-72 to 28.2 percent in 1975-76, and their number has been reduced by 57 during a period in which the total number of assistant principals increased by 190.

On the basis of this information, I have concluded that the current process used by the school system to select principals and assistant principals relies on the use of vague and subjective employment criteria which provide an opportunity for discrimination to occur. The application of this process has resulted in the disproportionate exclusion of women from supervisory positions, in violation of the standard set by the United States Court of Appeals in *Rowe v. General Motors,* 457 F.2d 342 (5th Cir. 1972). The *Rowe* decision and its progeny are applicable to sex discrimination as well as race discrimination. Accordingly, the Department applies the *Rowe* standard to employment discrimination which arises under Title IX.

(2) *Allocation of Coaching Services*

An analysis of the data collected during this review reveals a significant disparity between the coaching services for high school athletic programs provided to male and female students. A significant measure of this disparity is the salaries paid to persons coaching male and female athletic activities.

While all coaches are paid equally by the hour, the school system allots certain sports more "sessions" per year than others. For example, boys' basketball has been allo-

cated 80 sessions, while girls' basketball has been allocated only 50 sessions. Baseball, a boys' sport, has been allocated 70 sessions, while softball, a girls' sport, has been allocated only 50 sessions. In sports enrolling a large proportion of female students the coaching salaries are lower than those for sports having a large proportion of male students. (See Appendix O.)

The difference in coaching salaries produces a substantial difference in the salaries paid to male and female coaches. For example, male coaches during the 1975-76 school year earned on the average $1,377 for their services, while female coaches earned $1,155 for theirs. At least part of this substantial difference stems from lower compensation standards based on the sex identifiability of the sports being coached. For example, both men's and women's tennis have been allocated 30 sessions, but male tennis coaches earn an average of approximately $400 per year more than female tennis coaches, a difference which is not explained by Board policy. Whether covered by policy or not, the net result is that men earn an average of $222 per year, or 19 percent more than women, a difference which cannot be attributed to random variation.

On the basis of this information, I have concluded that the New York City school system is allocating a lower level of financial support to athletic coaching instruction being provided to women in violation of Title IX and the Departmental regulation, 45 CFR 86.41.

(3) *Maternity Leave*

In the course of our investigation and because of a complaint filed with this office, information was requested from

the New York City school system concerning the system's past and present maternity leave policies. Our review of this information indicates that the school system's present maternity leave policy (dated September 1, 1973) appears to comply with the requirements of Title IX. On the basis of this review, however, a failure by the school system to overcome the effects of past (pre-September 1973) discriminatory policies has been identified.

Under the pre-September 1973 policies, maternity leave was treated differently from other temporary disabilities and constituted a leave without pay (LWOP). This difference in treatment continues to have an adverse impact on female teachers, with regard to both seniority benefits and reimbursement for sick leave granted other teachers.

Teachers who took maternity leave before September 1973 were not entitled to sick pay for days absent for pre-natal care or maternity-related illness but were required to take LWOP for a specified period. Such teachers, had they been permitted to begin and end maternity leaves at their own discretion and had they not been required to use LWOP for the entire absence, would have accumulated greater seniority. This differential application of leave policies has adversely affected the placement of such teachers on seniority lists used as a basis for layoff decisions in 1975 and 1976 and has continued to disadvantage such teachers in their subsequent placement on preferred eligibility lists for recall.

The adverse impact of this discriminatory treatment was particularly severe for female teachers who served in the school system as regular substitute teachers and took maternity leave before September 1973. At that point in

time, because maternity leave was considered a break in service, all prior service was discounted in thereafter computing seniority, even though other benefits similar to those extended to regular teachers (e.g., salary, pension, accumulation of leave) were similar. While a recent change has occurred in the State Education Law, which allows the counting of all system service in computing seniority, the change is not retroactive to teachers laid off before July 1976.

On the basis of this information, I have concluded that the effects of the system's earlier maternity leave policy have an adverse and continuing impact on women who used maternity leave prior to the 1973-74 school year. This procedure constitutes a neutral employment criterion which continues the effect of previous discrimination in violation of the standard set by numerous court decisions. See, for example, *United States v. Bethlehem Steel Corporation,* 666 F.2d 672 (2d Cir. 1971) and *United States v. N. L. Industries,* 479 F.2d 354 (8th Cir. 1973). Accordingly, this violates Title IX and the Departmental regulation, 45 CFR 86.57(c) and 86.58(b).

In view of the findings set forth above with respect to discriminatory practices in the New York City Public school system, your District must submit a plan to this Office within 90 days of the receipt of this letter setting forth the remedial steps which the District will take in order to comply with Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. The plan must include provisions for remedying individual instances of past discrimination.

Letter to Chancellor Anker Dated 11/9/76

I am, of course, aware of the complexity of the violations and the difficulty of formulating certain remedies. I am also aware that this investigation came at a time when the school system was experiencing great difficulty due to the City's fiscal problems. Accordingly, Office for Civil Rights and Office of General Counsel staff who have formed the team investigating this matter would be happy to meet with you and members of your staff to explain our findings in greater detail.

The cooperation extended by those members of your staff with whom we have worked is much appreciated. Please be assured that this Office, consistent with its statutory responsibilities, will make every effort to assist the school system in developing a plan to correct the violations which have been identified.

Sincerely,

MARTIN GERRY
Martin H. Gerry
Director
Office for Civil Rights

[Appendix Omitted—See C.A. App. pp. 60-86]

Letter to Irving Anker Dated 7/1/77

Chancellor Irving Anker
Board of Education of the
City of New York
110 Livingston Street
Brooklyn, New York 11201

Dear Chancellor Anker:

We have received your school district's application for assistance under the Emergency School Aid Act (ESAA) and have reviewed the district's compliance with the eligibility requirements contained in the statute and the implementing regulations.

I.

On the basis of this review, we have determined that your district does not meet the requirements for eligibility for the reasons described below.

A.

45 CFR 185.43(b)(2) of the ESAA regulations provides:

> No educational agency shall be eligible for assistance under the Act, if after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promoting, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility), including the assignment of full-time classroom teachers to the schools of such agency in such a man-

ner as to identify any of such schools as intended for students of a particular race, color, or national origin.

1. In the New York City Public School system, the hiring of teachers and their assignment to Community School District (CSD's) is accomplished through the procedures discussed in the letter of November 9, 1976, from the Office for Civil Rights to you. As a result of these procedures, in school year 1975-76, the city-wide percentage of minority elementary school teachers for your 32 CSD's was 14.3%. Data indicates that 9 (28%) of your 32 CSD's had minority elementary school student enrollment below 50%. None of those 9 predominantly nonminority CSD's had a percentage of minority teachers above the city-wide percentage. In fact, the highest percentage of minority teachers in any predominantly nonminority CSD was 7.7% in CSD 27. Of the 23 CSD's with predominantly minority student enrollment, 14 (61%) had percentages of minority teachers above the city-wide percentage; and 13 (93%) of those 14 CSD's had minority student enrollment in excess of 75%.

Examples of the discriminatory teacher recruiting, hiring, and assignment patterns which exist in your system follow: CSD 5 had a minority elementary student percentage of 99.1% and a minority elementary teacher percentage of 57.3%; CSD 3, with a minority elementary student percentage of 85.8%, had a minority elementary teacher percentage of 32.2%; CSD 31, on the other hand, had a minority elementary student percentage of 16.8% and a minority elementary teacher percentage of only 2.4%; and CSD 26, with a minority elementary student percentage of 23.7%, had a minority elementary teacher percentage of only 4.6%.

Thus, there is a clear pattern in your school system, wherein minority elementary school teachers are concentrated in CSD's with high percentages of minority elementary school students. Those CSD's with low percentages of minority elementary school students have very low percentages of minority elementary school teachers.

2. The same pattern exists in your junior high schools. The percentage of minority junior high school teachers for all 32 CSD's was 16.7%. Eight (25%) of your 32 CSD's had minority junior high school student enrollments below 50% and none of these 8 CSD's employed more than 10% minority teachers. Of the 24 predominantly minority CSD's, 14 (58%) had percentages of minority junior high school teachers above the citywide percentage; and 13 (93%) of those 14 had minority junior high school student enrollments in excess of 75%.

3. A pattern also exists in the assignment of teachers to high schools in your system. Data indicates that 70% of all minority high school teachers are assigned to high schools in which minority student enrollment exceeds 76%. Conversely, only 30% of all minority high school teachers are assigned to those high schools in which minority student enrollment is below 76%.

Furthermore, it is possible, based on the composition of their teaching staffs, to identify high schools in your system as intended for either minority or nonminority students. A list of the high schools in which this is possible is attached to this letter.

Thus, a pattern exists in your district wherein minority teachers are concentrated in high schools with high per-

centages of minority students. High schools with low percentages of minority students have very low percentages of minority teachers.

4. There also exists within your high schools a clear pattern of assigning minority principals and assistant principals to predominantly minority high schools. Data shows that 70% of the minority assistant principals and 85% of the minority principals are in high schools with minority student enrollment in excess of 76%. Conversely, only 30% of the minority assistant principals and 15% of the minority principals are in high schools with less than 76% minority student enrollment.

In summary, your policies, practices, and procedures, which have been discussed at great length in the aforementioned November letter and have permitted these patterns to develop, have resulted in discrimination on the basis of race, color, or national origin in the recruiting, hiring, and assignment of minority teachers, assistant principals, and principals.

B.

45 CFR 185.43(d)(2) states:

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy, or procedure which results in or has resulted in discrimination against children on the basis of race, color, or national origin, including but not limited to:
>
> • • •

> (2) Denying equality of educational opportunity or otherwise discriminating against national origin minority children on the basis of language or cultural background.

1. Information provided in your Title VII (Bilingual Education Programs, Elementary and Secondary Education Act) application for 1975-76 indicated that there were 35,809 students in your system with "limited English language ability." Information provided by you for the Special Compliance Information Report (SCIR) for school year 1975-76 indicated that there were 16,813 students in your system with "moderate and severe" English language difficulty. This represented only students from those schools listed on the Title VII applications. Thus, there was a difference of 18,996 students. Your district apparently failed to ascertain whether or not these 18,996 students were in need of some educational program to remedy their English language difficulty. The large discrepancy between these two reports demonstrated a failure on your part to properly identify and assess the needs of students with limited English language ability, thereby denying equality of educational opportunity to these national origin minority students.

For the 14 Community School Districts not applying individually, a similar discrepancy existed. The Title VII applications for these 14 CSD's showed 15,256 students with limited English language ability. The SCIR's for these same 14 CSD's showed 8,089 students with severe and moderate English language difficulty. Again this number represented only students from those schools listed on the Title VII applications. The difference of 7,167 students

indicated that these 14 CSD's had not properly identified and assessed the needs of students with limited English language ability. Thus, these students have been denied equal educational opportunity on the basis of their language background.

2. Information provided by you in the Special Compliance Information Report (SCID) (1975-76) indicated that there were 63,782 elementary students with severe and moderate English language difficulty in your school system who were classified as requiring some educational program to remedy their English language difficulty. That same report showed that only 43,029 of those students were receiving such educational services. Thus, 20,753 students, identified by you as having severe and moderate English language difficulty, were receiving no such educational services. These 20,753 students, therefore, have been denied equal educational opportunity on the basis of their language background.

An analysis of data in the SCIR's on the 14 CSD's not applying individually, indicated a similar discrepancy between the number of students in these CSD's classified as requiring some educational programs to remedy their English language difficulty and the number of students receiving such services. In these districts 29,833 students were classified as requiring the services. The same reports showed that only 19,141 of those students were receiving such educational services. Thus, 10692 students identified as requiring these educational services were not receiving them.

C.

45 CFR 185.43(d)(6) states:

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy, or procedure which results or has resulted in discrimination against children on the basis of race, color, or national origin, including but not limited to:
>
> • • •
>
> (6) Denying comparable facilities or instruction or other services to minority group children enrolled in the schools of such agency on the basis of race, color, or national origin.

1. Analysis of your system indicated that the average experience for elementary schools was approximately 12.2 years in 1975-76. (This average was determined by adding the average teacher experience for each elementary school and dividing that sum by the number of elementary schools in your system.) Twenty-three (72%) of your 32 CSD's had percentages of minority elementary school students above 50%. Of those 23 CSD's, 14 (61%) had an average teacher experience below the city-wide average. Meanwhile, 9 (28%) of your 32 CSD's had percentages of minority elementary school students below 50%, and only 2 (22%) of these 9 CSD's had an average teacher experience below the city-wide mean. Overall, 87.5% of those CSD's with an average teacher experience below the city-wide average were CSD's with high percentages of minority elementary school students enrolled.

A similar pattern existed in your junior high schools. The average teacher experience for junior high schools in your system was approximately 11.0 years. (This average was determined by adding the average teacher experience for each junior high school and dividing that sum by the number of junior high schools in your system.) Of the 24 CSD's with percentages of minority junior high school students above 50%, 17 had an average teacher experience below the city-wide mean. Of the 8 CSD's with percentages of minority junior high school students below 50%, only 1 (12%) had an average teacher experience below the city-wide average. Overall, 94% of those CSD's with an average teacher experience below the city-wide average were CSD's with high percentages of minority students enrolled.

There is a strong relationship between the racial/ethnic composition of the students in CSD's and the experience of the teachers in CSD's. Your policies, practices, and procedures, which have caused or permitted this relationship to exist, have resulted in the denial of comparable instructional services to minority group children. This constitutes discrimination against these minority group children on the basis of race, color, or national origin.

2. Analysis of your school system indicated that, for school year 1975-76, the average teacher salary for all elementary schools in your system was approximately $17,678. (This average was determined by adding the average teacher salaries for each elementary school and dividing that sum by the number of elementary schools in your system.) Twenty-three (72%) of the system's 32 CSD's had percentages of minority elementary school students of over 50%. Of these 23 CSD's, 16 (69%) had average teacher salaries below the citywide average; and 12 (75%) of these

16 employed percentages of minority teachers at or above the city-wide percentage. Meanwhile, of the 9 CSD's with percentages of minority elementary school students below 50%, only 2 (22%) had average teacher salaries below the citywide average. Overall, 88% of the CSD's with average elementary school teacher salaries below the city-wide average were CSD's with high percentages of minority students.

A similar pattern was found in your junior high schools. The average teacher salary for all junior high schools in your system was approximately $17,377. (This average was determined by adding the average teacher salaries for each junior high school and dividing that sum by the number of junior high schools in your system.) Of the 24 CSD's with percentages of minority junior high school students over 50%, 13 (54%) had average teacher salaries below the city-wide average. However, of the 8 CSD's with percentages of minority junior high school students below 50%, only one of the CSD's with average junior high school teacher salaries below the city-wide average enrolled high percentages of minority students.

Your policies, practices, and procedures in the area of teacher salaries have resulted in the denial of comparable instructional services to minority group children on the basis of race, color, or national origin.

D.

45 CFR 185.43(d) states:

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy or procedure which results or has resulted in discrimination against children on the basis of race, color, or national origin.

Information from the New York City Board of Education Profiles: Payroll Data (1974-75), showed that academic high schools in your system with low percentages of minority students enrolled received higher per pupil expenditures of tax levy monies for instructional salaries than academic high schools with high percentages of minority students enrolled. Analysis showed that per pupil expenditures of tax levy monies for instructional salaries in high schools with less than 20% minority student enrollment was $844.38, while such expenditures in high schools with more than 80% minority student enrollment was $735.15. Thus, there was a difference of $109.23 per pupil.

Your formula for allocating tax levy monies for instructional salaries discriminated against children in that per pupil expenditures of tax levy monies for students in predominantly minority academic high schools were less than similar expenditures for students in nonminority academic high schools. Thus, your system of allocating tax levy monies for instructional salaries constitutes a violation of 45 CFR 185.43(d).

II.

Your district may request an opportunity to show cause why the determination of ineligibility should be revoked and its application considered for funding. Such a request should be directed to:

Dr. Herman R. Goldberg
Associate Commissioner
Equal Educational Opportunity Programs
Room 2001, Federal Office Building #6
400 Maryland Avenue, S.W.
Washington, D.C. 20202

The request must be received (not merely sent) within 14 days of the date of this letter.

If your district requests the opportunity described above, an informal conference with representatives of the district will be held within 7 days of the receipt of the request. Please understand that the purpose of such a conference is to provide your district with an opportunity to demonstrate why it should not have been found ineligible; if your district wishes to take corrective action, see Part III below concerning an application for a waiver of ineligibility.

III.

Your district may establish its eligibility for assistance by applying to the Secretary of Health, Education, and Welfare for a waiver of ineligibility pursuant to section 706(d) of the ESAA (20 U.S.C. 1605(d)) and section 185.44 of the program regulations (45 CFR 185.44). An application for waiver must include information and assurances which show that any activity resulting in ineligibility has ceased to exist and will not reoccur after the submission of the waiver application. (20 U.S.C. 1605(d)(1); 45 CFR 185.44 (b)).

Specifically, an application for a waiver of ineligibility based upon the findings in Section A of Part I above must contain the materials required by 45 CFR 185.44(b), which provides as follows:

> An application for waiver . . . shall contain such information and assurances as will insure that any practice, policy, procedure, or other activity resulting in ineligibility has ceased to exist or occur, and shall include

such provisions as are necessary to insure that such practice, policy, procedure, or activity will not reoccur after the submission of such application.

More specifically, regarding the assignment of high school teachers, an application for a waiver of ineligibility based upon the findings in Section A of Part I above must contain the materials required by 45 CFR 185.44(d)(3), which provides as follows:

> In the case of ineligibility resulting from discriminatory assignment of teachers as prohibited by §185.43 (b)(2), such applications for waiver shall contain evidence that such agency has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color, or national origin. Such nondiscriminatory assignments shall, in the case of a local educational agency implementing a plan described in §185.11(b) conform to the requirements of such plan with respect to the assignment of faculty. In the case of local educational agencies not implementing such a plan, or implementing such a plan which contains no provision as to assignment of faculty, such assignments shall be made so that the proportion of minority group full-time classroom teachers at each school is between 75 per centum and 125 per centum of the proportion of such minority group teachers which exists on the faculty as a whole.

Additionally, an application for a waiver of ineligibility based upon the findings in Section B of Part I above, regarding the identification and providing of educational services to students with English language difficulties, must

contain the materials required by 45 CFR 185.44(f)(1), which provides as follows:

> In the case of ineligibility under §185.43(d), an application for waiver shall contain evidence that the practice, policy, or procedure prohibited by §185.43(d) has ceased to exist or occur and that the effects of such practice, policy, or procedure have been remedied or eliminated. In particular:
>
> (1) In the case of a denial of equal educational opportunity to national origin minority children as described in §185.43(d)(2), such agency shall submit an educational plan of sufficient comprehensiveness to remedy or eliminate the effects of such denial and to meet the special educational needs of all national origin minority group children for whose education such agency is responsible. Such a plan, if required and approved under this subparagraph, shall be implemented regardless of whether funds for such purpose are available under the Act.

Finally, an application for a waiver of ineligibility based upon the findings in Sections C and D of Part I, regarding the assignment of experienced teachers and teacher salaries and the per pupil expenditures of tax levy monies, must contain the materials required by 45 CFR 185.44(f), which provides as follows:

> In the case of ineligibility under §185.43(d), an application for waiver shall contain evidence that the practice, policy, or procedure prohibited by §185.43(d) has ceased to exist or occur and that the effects of such practice, policy, or procedure have been remedied or eliminated.

An application for a waiver of ineligibility should be directed to:

David S. Tatel, Director
Office for Civil Rights
Office of the Secretary
Department of Health, Education, and Welfare
300 Independence Avenue, S.W. Room 5514
Washington, D.C. 20201

In order to allow sufficient time for review of applications for waivers prior to the timely commitment of currently available funds, such an application should be submitted as promptly as its full and complete preparation permits. We urge that your district file any application for a waiver, or inform Mr. Tatel of your intention to do so, within 21 days of the date of this letter.

IV.

The issues reviewed in reaching the conclusion that your district is ineligible for assistance under the Emergency School Aid Act (ESAA) do not exhaust your district's civil rights compliance responsibilities. Only the specific eligibility requirements for assistance under ESAA (found at 45 CFR 185.43) were used in making this determination. Accordingly, this letter should be considered separated and apart from the Office for Civil Rights' letters to your district dated November 9, 1976 and January 18, 1977.

This ESAA determination in no way modifies, alters, or otherwise affects the aforementioned letters from the Office for Civil Rights, nor does it preclude additional findings of noncompliance with Federal civil rights laws.

V.

It should be emphasized that this letter relates solely to your district's eligibility for ESAA assistance. The establishment of eligibility does not, by itself, ensure that an application is funded. Funding decisions, of course, are made on the basis of the quality of applications submitted by eligible applicants.

Sincerely,

Herman R. Goldberg
Associate Commissioner
Equal Educational Opportunity Programs

RSimmons/kje/6-16-77

Attachment

High Schools Identifiable as Intended for Minority or Nonminority Students Based on Composition of Teaching Staffs

In the New York City Public School System, 62.6% of the high school students are minority students, and 8.3% of the high school teachers are minority teachers. Thus, it is possible, based on the composition of their teaching staffs, to identify the following high schools as intended for either minority or nonminority students:

School	*% Minority Students*	*% Minority Teachers*
Harlem	100.0	70.0
Ben Franklin	98.3	27.9
Stuyvesant	31.0	2.8
Park East	93.8	40.0
Harlem Prep	98.4	69.2
Murray Bergtraum	86.9	17.9
Lower East Side Prep	100.0	63.2
Martin Luther King, Jr.	96.0	25.0
Satellite Academy	92.9	25.0
Auxiliary Services	85.7	42.0
Bronx HS of Science	31.3	2.8
Jane Addams	98.7	34.3
Lafayette	29.2	0.6
Midwood	32.6	1.7
Abraham Lincoln	37.0	0.7
James Madison	35.6	0.9
New Utrecht	22.5	0.0
Boys and Girls	99.9	20.9
Eastern District	97.0	18.0
Bushwick	94.2	20.4

School	*% Minority Students*	*% Minority Teachers*
Fort Hamilton	30.0	3.7
Sheepshead Bay	32.5	3.7
F.D. Roosevelt	29.4	1.8
South Shore	36.9	2.4
Pacific	99.8	37.5
Redirection	97.7	47.6
William E. Grady	22.2	0.0
August Martin	97.6	16.7
Benjamin Cardozo	38.5	3.2
Francis Lewis	36.9	1.7
Forest Hills	38.8	0.8
Long Island City	30.2	2.8
Richmond Hill	28.5	3.4
Bayside	30.4	1.3
New Dorp	4.3	0.0
Curtis	32.1	3.0
Tottenville	3.7	1.9
Susan E. Wagner	13.0	2.5
Ralph McKee	19.1	3.1

Memorandum of Understanding Between Bd. of Ed. and Office for Civil Rights

MEMORANDUM OF UNDERSTANDING BETWEEN:

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK AND THE OFFICE FOR CIVIL RIGHTS, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

The Board of Education agrees to adopt and implement, and the Office for Civil Rights agrees to accept as compliance with the requirements of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, as to the subjects addressed, an affirmative action plan containing, in detailed form, the following commitments and affirmative actions with respect to the employment and assignment of teachers and supervisors in the New York school system:

1. Not later than September of 1979, the teacher corps of each District in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.

2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.

3. The Board of Education will demonstrate to the Office for Civil Rights, subject to prescribed review, that any failure to meet the commitments set forth in

paragraphs one and two hereof results from genuine requirements of a valid educational program. In addition, the Board will demonstrate that it has made and is continuing to make special efforts to overcome the effects of educationally-based program exceptions through effective use of such mechanisms as recertification, recruitment and special assignment of teachers.

4. The Board of Education will adopt and implement the following affirmative action procedures, and will sponsor and actively support state legislation at the next session of the Legislature where necessary to accomplish these ends:

   (a) Any test used henceforth to determine whether a person is qualified for a teaching position in the system shall be validated prior to its being administered except that in cases of demonstrable educational necessity, for example, where there are no eligible lists, a test may be used prior to its validation for temporary assignments, provided that validation shall be accomplished as soon as practicable.

   Tests shall be validated pursuant to accepted professional standards as exemplified in the Uniform Guidelines for Employees Selection Procedures (41 Fed. Reg. 51734, Nov. 23, 1976). Prior to the administration of any test, the Office for Civil Rights shall have a reasonable opportunity to review and consult with respect to the design and implementation of the proposed validation.

(b) All existing eligibility lists by license shall be combined, and the names of all persons contained thereon shall be merged with the names of any persons who have passed any new tests, without regard to the dates of examinations.

(c) Rank ordering of persons who have passed examinations for the system shall be abolished.

(d) In employing and assigning teachers pursuant to these modified standards and procedures, the Board of Education will implement affirmative action mechanisms found to be appropriate, such as, for example, giving hiring preference to all eligible persons with prior experience in the system.

(e) In implementing such modified standards and procedures, the Board of Education will take all steps necessary to ensure fulfillment of the foregoing objectives, throughout the system.

5. The Board of Education agrees that, in the event that the above-described legislation is not adopted so as to govern employment decisions for the 1978-79 school year, the Board will seek appropriate litigation in support of the agreed objectives.

6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor pool by race, ethnicity, and sex by an independent expert acceptable to the parties and pursuant to methodology and standards agreed to by the parties. Through the adoption and implementation of the affirmative action procedures and legislation provided in paragraph 4 of this Memorandum and other efforts taken or to to be taken by the Board, the Board commits that by September of 1980, the levels of minority participation in the teaching and supervisory service will be within a range representative of the racial and ethnic composition of the relevant qualified labor pool.

It is understood that this commitment shall not require the Board to lay off any teacher currently employed by the Board or to hire any teacher who has not met appropriate requirements for employment, not inconsistent with this agreement. It is further understood that the commitment made herein does not establish quotas. Failure to meet this commitment shall not be considered a violation of this agreement if the Board demonstrates that it has implemented the provisions of this agreement in a good faith effort to meet the commitment made herein.*

The Board had advised the Office for Civil Rights that the Board expects to consult with the United Federation of Teachers and others regarding the selection of the independent expert and the standards and methodology to be used in the above study. Likewise, the Office for Civil Rights has advised the Board that it expects to consult with other government agencies, civil rights organizations, and others regarding the selection of the independent expert and the standards and methodology to be used in the study.

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* The commitment herein is subject to applicable standards of law. (See *Hazelwood School Dist. v. United States*, 97 S. Ct. 2736.)

7. The Board of Education agrees that all employment decisions for teaching personnel, other than those on the Preferred Lists, made between the date of the execution of this Memorandum and the effective date of the above described legislation will be subject to adjustments arising from the new legislation or successful litigation pursuant to Paragraph 5.

8. The Board of Education commits itself to pursue a program of affirmative action to increase the number of women in the supervisory service, including a plan to reach a systemwide level of participation by women within a range representative of the pool of available qualified women by a date to be agreed upon with the Office for Civil Rights. The Board further agrees that it will establish a procedure whereby no person shall be appointed to a supervisory position until an affirmative action officer in the central personnel administration has studied the file of applicants for the particular position and determined that the appointment process demonstrates good faith compliance with the affirmative action plan. The Board agrees to review with the Office for Civil Rights the apropriateness of standards and procedures for selection of supervisory personnel to insure conformity to this paragraph.

9. Not later than one hundred twenty days after the execution of this Memorandum the Board of Education shall submit to the Office for Civil Rights a detailed plan describing the steps and mechanisms to be used in attaining the objectives set forth herein. This plan shall include interim objectives stated by

year, by which the Board will achieve the commitments made herein. During the 120 day period and thereafter during the term of this agreement, the Board of Education will cooperate with the Office for Civil Rights in generating and sharing data and information with respect to compliance with the terms of this Memorandum and the fulfillment of its objectives. The Board shall file with the Office for Civil Rights annual reports at times to be agreed upon by the parties demonstrating the progress toward the interim and final objectives.

The Board of Education of the
City of New York,

by:

IRVING ANKER
Chancellor

The Office for Civil Rights,
United States Department of
Health, Education and Welfare,

by:

DAVID S. TATEL
Director

Date: September 7, 1977

Memorandum of Understanding

The United Federation of Teachers commits itself to support the adoption of legislation, as soon as possible during the 1977-78 term of the New York legislature, with respect to the provisions of paragraph four of the foregoing Memorandum of Understanding between the Board of Education of the City of New York and the Office for Civil Rights of the United States Department of Health, Education, and Welfare, including specifically those provisions relating to abolition of rank ordering of eligibility lists and merging such lists without regard to the dates of examination.

ALBERT SHANKER, President

Affidavit of Herman R. Goldberg Dated 10/18/77

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77C 1928

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*

Plaintiffs,

v.

JOSEPH CALIFANO, *et al.*

Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

DR. HERMAN R. GOLDBERG, being duly sworn, hereby deposes and says:

1. I am Associate Commissioner for Equal Educational Opportunity Programs, United States Office of Education, Department of Health, Education, and Welfare, and have held this position since July 1, 1971. I submit this affidavit in support of defendants' motion for summary judment in this case.

2. As part of my duties I am responsible for the administration of programs under the Emergency School Aid Act ("ESAA"; 20 U.S.C. 1601 *et seq.*).

3. As provided in section 1601(b) of the Act, the purpose of the ESAA is to provide financial assistance to: (a) meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools; (b) encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and (c) aid school children in overcoming the educational disadvantages of minority group isolation.

4. The ESAA provides for financial assistance to achieve the purposes of the Act to local educational agencies ("LEA"), defined in section 1619(8) of the Act and 45 CFR 185.02(e), and other organizations. The statute was enacted in 1972, and this is the fifth year in which grants under it have been made.

5. ESAA grants relevant to this action are awarded on a competitive basis to applicants which meet the requirements of the statute. They are for one year. Each year there is a new and separate competition for available appropriations.

6. The type of grant which is relevant to this action is a Basic Grant under section 1605(a) of the Act. These are grants to LEA's for specific activities authorized under section 1606 of the Act which support the implementation of a desegregation plan, a plan for the elimination, reduction, or prevention of minority group isolation, an interdistrict transfer plan, or a plan to establish or maintain one or more integrated schools. The types of activities

which may be funded under a Basic Grant are: special remedial services, hiring and training professional staff and teacher aides, inservice teacher training, counseling, new curricula, career education, innovative interracial programs, community activities, administrative services, planning and evaluation, and facility remodeling.

7. Congress originally appropriated $137,600,000 for Basic Grant ESAA assistance for fiscal year 1977 (P.L. 94-439, enacted September 30, 1976). Congress also made a supplemental appropriation of $10,000,000 to provide assistance to school districts for which the original Basic Grant appropriation was insufficient to meet their needs, and which were implementing voluntary plans to eliminate or reduce minority group isolation (P.L. 95-26, enacted May 4, 1977). Under section 406 of P.L. 94-439 and section 301 of P.L. 95-26, the period for obligation of appropriations under those statutes expired on September 30, 1977.

8. This year, LEA's across the country submitted a total of 561 Basic Grant applications requesting assistance totaling $315,496,317. Thus, the aggregate amount of assistance requested by LEA's this year for Basic Grants was more than double the amount appropriated by Congress for such grants. It is my responsibility to ensure that the appropriated funds are made available in the manner prescribed by the Act and its implementing regulations.

9. In order to receive a grant under the Act an LEA must, among other things, meet the requirements of section 1605(d). That section provides that no educational agency shall be eligible for assistance under the Act if it has, since June 23, 1972, engaged in any of several practices set out

in section 1605(d)(1)(A)-(D). Enforcement of the limitations on eligibility in section 1605(d)(1)(A)-(D) is not discretionary. Moreover, section 1605(d)(4) requires that before an application for assistance is approved, the applicant must be determined to be not ineligible by reason of these limitations.

10. If an LEA does not meet the requirements of section 1605(d), it may establish its eligibility for assistance by submitting to the Secretary an application for a waiver of ineligibility. Under section 1605(d)(3) the Secretary may grant an application for a waiver upon determining that the disqualifying practice has ceased to exist and will not reoccur. Regulations implementing section 1605(d) are set out at 45 CFR 185.43 and 185.44.

11. In response to a notice of closing date for receipt of applications published in the Federal Register on November 15, 1976 (41 F.R. 50353), the Board of Education of the City School District of the City of New York (hereinafter "Central Board") and various Community School Districts in the City filed a total of 32 applications for Basic Grants, Pilot Project grants, and Bilingual Project grants under the Act. Of these applications, 23 had sufficient program merit to warrant funding under the minimum standards set out at 45 CFR 185.14 (for Basic Grants), 185.24 (for Pilot Projects), and 185.54 (for Bilingual Projects). See amendments to these regulatory provisions at 42 F.R. 3842, January 21, 1977. Of the 23 applications which exceeded minimum standards, 20 demonstrated sufficient program merit to warrant approval in competition with other applications. However, judgments as to the program merit of applications are separate and apart from determinations as to the

eligibility or ineligibility of applicants under section 1605(d) of the Act.

12. All New York City applicants initially failed to establish eligibility under section 1605(d). However, all such applicants, except the Central Board and Community School Districts #10 and #11 were able to establish their eligibility either by providing additional material at show cause meetings under 45 CFR 185.46 or by taking corrective action and filing successful applications for waivers of ineligibility. Several Community School Districts were initially determined to be ineligible because their faculty assignment practices did not comply with section 1605(d) of the Act and 45 CFR 185.43(b)(2) of the program regulations, but later established their eligibility by taking the necessary corrective action and obtaining waivers of ineligibility.

13. The following New York City Community School Districts received fiscal year 1977 ESAA grants in the amounts indicated:

Basic Grants

C.S.D. #3	$2,700,000
C.S.D. #4	731,612
C.S.D. #6	424,089
C.S.D. #9	485,959
C.S.D. #18	386,753
C.S.D. #19	150,858
C.S.D. #21	1,100,269
C.S.D. #22	407,038
C.S.D. #24	712,853
C.S.D. #25	822,704
C.S.D. #26	410,431
TOTAL	$8,332,566

Pilot Project Grants

C.S.D. #3	$ 982,859
C.S.D. #4	784,831
C.S.D. #13	721,519
C.S.D. #19	777,568
TOTAL	$3,267,777

Bilingual Project Grants

C.S.D. #4	$1,433,227
C.S.D. #19	475,507
TOTAL	$1,908,734

14. The following New York City applicants, referred to in paragraph 12 above, would have received fiscal year 1977 ESAA grants in the amounts indicated but for their failure to meet the requirements of section 1605(d):

Basic Grants

C.S.D. #11	$ 298,891
New York City Central Board	3,559,132
TOTAL	$3,858,023

Pilot Project Grants

C.S.D. #10	$ 124,219

15. The total amount of funds awarded to New York City applicants for Basic Grants, set out in paragraph 13 above ($8,332,566) represents 64.1 percent of the amount awarded for Basic Grants within New York State this year. (The amount awarded does not include the amount set aside for the Central Board and C.S.D. #11 pursuant to this court's order of September 27, 1977.)

16. The Central Board timely filed three applications for fiscal year 1977 assistance under the Act. The Central Board's Pilot Project application failed to meet minimum program standards set out of 45 CFR 185.24 and therefore could not be approved in any event. Its Bilingual Project application met minimum program standards, but funds available to support Bilingual Projects throughout the country were exhausted before the Central Board's application could be reached in rank order; thus, this application could not be funded in any event. See 45 CFR 185.54.

17. The Central Board's initial Basic Grant application contained seven components. It was evaluated under applicable criteria and found not to meet minimum program standards. Pursuant to section 1609(d)(2) of the Act and 45 CFR 185.14, I communicated this finding and the specific reasons for it to the Central Board by a letter to Chancellor Irving Anker dated March 21, 1977 (Exhibit I, attached hereto). The Central Board subsequently resubmitted four revised components of its initial Basic Grant application. (The three omitted components are thus not a part of any pending application.) Each of the four revised components was evaluated separately and the four educational and programmatic quality scores (assigned pursuant to 45 CFR

185.14(b)) were averaged to set the quality score of the application as a whole.

The quality scores of the four components were:

Early Childhood Education	22⅔
Easing Student Adjustment	37⅓
Open Enrollment Centers	34⅔
Reducing Intergroup Tensions	17⅔
Total	112⅓
Average	28.1

Thus, the Central Board's application received a quality score slightly above the minimum of 28 required by 45 CFR 185.14(c)(2). This quality score was then added to the statistical score of 28 (assigned pursuant to 45 CFR 185.14 (a)) to set the total score of 56.1 for the application.

18. In response to the November 15, 1976 notice of closing date referred to in paragraph 11 above, Community School District #11 timely filed applications for a Basic Grant and a Pilot Project grant. Each application was initially found not to meet minimum program standards. I communicated these findings and the specific reasons for them to Community Superintendent Nicholas Cicchetti by letters dated March 21, 1977 (Exhibits 2 and 3 attached hereto). C.S.D. #11 subsequently resubmitted revised applications. The revised Pilot Project application was evaluated and again found not to meet minimum program standards; thus, this application could not be approved in any event. The revised Basic Grant application was evaluated

and assigned an educational and programmatic quality score of 36⅓. This quality score was added to the statistical score of 24 to set the total score of 60⅓ for the application.

19. On the basis of the information and recommendations submitted to me by the Director, Office for Civil Rights, I determined that the Central Board did not meet the eligibility requirements for assistance under the Emergency School Aid Act for the reasons set forth in my letter of July 1, 1977 to Chancellor Anker (Exhibit 4, attached hereto).

20. On the basis of the information and recommendations submitted to me by the Director, Office for Civil Rights, I determined that Community School District #11 did not meet the eligibility requirements for assistance under the Emergency School Aid Act for the reasons set forth in my letter of July 1, 1977 to Community Superintendent Cicchetti (Exhibit 5, attached hereto).

21. In the letter referred to in paragraph 19 above, the Central Board was informed that it could request an opportunity to show cause why the determination of ineligibility should be revoked. The Central Board requested a show cause meeting which was held on July 22, 1977. With respect to faculty assignment, the representatives of the Central Board described, in general terms, the operation of State law concerning teacher assignments and apprised me of union agreements affecting these assignments. In addition, they described steps that the Central Board intended to take in assigning teachers in the future. However, no written material was presented concerning the finding of a failure to meet faculty assignment requirements.

22. I determined that the information presented at the show cause meeting and materials provided by the Central Board under a cover letter to me from Chancellor Anker dated August 10, 1977 (Exhibit 6, attached hereto), did not constitute a sufficient basis to revoke the finding of ineligibility. However, I withdrew that part of the finding related to the issue of comparability of services (teacher experience, salary, and per pupil expenditure). These determinations are set forth in my letter to Chancellor Anker dated September 16, 1977 (Exhibit 7, attached hereto).

23. In the letter referred to in paragraph 20 above, Community School District #11 was informed that it could request an opportunity to show cause why the determination of ineligibility should be revoked. Community Superintendent Cicchetti requested such an opportunity by a letter to me dated July 8, 1977 (Exhibit 8, attached hereto), and on July 20 such a meeting was held by my Assistant, Dr. George R. Rhodes.

24. I determined that the information presented at the show cause meeting and supplementary materials provided by Mr. Cicchetti in a letter to the Director, Office for Civil Rights, dated July 26, 1977 (Exhibit 9, attached hereto) did not constitute a sufficient basis to revoke the finding of ineligibility. However, I withdrew that part of the finding related to the issue of comparability of services (teacher experience). These determinations are set forth in my letter to Mr. Cicchetti dated September 15, 1977 (Exhibit 10, attached hereto).

25. Prior to approval of any ESAA application a determination must be made in accordance with section 1605

(d)(4) that the applicant is not ineligible for assistance by reason of the limitations contained in section 1605(d)(1)(A)-(D) of the Act. For the reasons set out in the letters referred to in paragraphs 19 and 20 above, and taking into account the information presented in connection with the informal meetings referred to in paragraphs 21 and 23 above, I was unable to approve the applications of the Central Board and Community School District #11.

26. On September 27, 1977 this court required defendants in this case to set aside $3,858,023 of fiscal year 1977 appropriations under the Act pending resolution of this matter. Defendants have complied with this requirement. However, in order to do so, it was necessary to deprive other LEA's of funds which would have been made available to them in the absence of the court's order. These LEA's have submitted meritorious applications and, unlike the Central Board and C.S.D. #11, have met the requirements of section 1605(d) of the Act. The LEA's which have thus far been deprived of funds and the amounts of the deprivation to each are as follows:

Charles City County Board of Education, Virginia	$102,689
Berkley County Board of Education, West Virginia	467
Independent School District #625, St. Paul, Minnesota	6,813
Milwaukee Public Schools, Wisconsin	13,861
Ferguson Reorganized School District, Missouri	98,134
Omaha School District, Nebraska	3,971
Pascagoola Municipal Separate School District, Mississippi	198,772

Affidavit of Herman R. Goldberg Dated 10/18/77

27. Inasmuch as the Central Board and Community School District #11 have not established their eligibility for assistance under the ESAA, I urge the court to permit the distribution of the funds now set aside pursuant to the court's order to those eligible applicants identified in paragraph 26 above, and to dissolve the injunction issued in this case.

HERMAN R. GOLDBERG
Herman R. Goldberg

DISTRICT OF COLUMBIA)
) ss
CITY OF WASHINGTON)

Subscribed to and sworn to before me this 18th day of October, 1977.

LORRAINE HALLOWAY
Notary Public

My Commission Expires
Jan. 1, 1978
(Seal)

Affidavit of David S. Tatel Dated 10/26/77

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77C 1928

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,

Plaintiffs,

v.

JOSEPH CALIFANO, *et al.*,

Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, *ss.*:

DAVID S. TATEL, being duly sworn, hereby deposes and says:

1. I am Director of the Office for Civil Rights (OCR), Department of Health, Education, and Welfare (HEW), and have held this position since May 2, 1977.

2. As part of my duties I am responsible for advising the Associate Commissioner for Equal Educational Opportunity Programs, HEW, on the eligibility of applicants for funds under the Emergency School Aid Act ("ESAA"; 20 U.S.C. 1601 *et seq.*) with particular regard for the treat-

ment of minority groups as required by the Act and the applicable regulations, 45 C.F.R., Part 185.

3. Prior to July 1, 1977 I provided Dr. Herman Goldberg, Associate Commissioner for Equal Educational Opportunity Programs, United States Office of Education, Department of Health, Education, and Welfare with draft letters to Chancellor Irving Anker, and Community School District No. 11 Superintendent Nicholas Cicchetti. The letters recited my determination and recommendation that the Board of Education of the City School District of the City of New York (hereinafter Central Board) and Community School District No. 11 were ineligible for ESAA funds. Among the several reasons of ineligibility cited in these documents was that the Central Board and Community School District No. 11 did not meet the requirements of Section 1605(d)(1)(B) of the Emergency School Aid Act, and its implementing regulation, 45 C.F.R. Section 185.43(b)(2). These letters contained the factual information set forth in the July 1, 1977 letters from Dr. Goldberg to Chancellor Anker and Superintendent Cicchetti. (See exhibits 4 and 5, Goldberg, Affidavit). I also provided Dr. Goldberg with a copy of a November 9, 1976 letter from Martin Gerry to Chancellor Anker (Exhibit 11 attached hereto).

My recommendation was based on information contained in the following letters and documents:

A. Letter from Martin Gerry, Director, Office for Civil Rights to Chancellor Irving Anker, Board of Education of the City of New York, dated November 9, 1976. (Exhibit 11).

B. Letter and attachment from Robert J. Christen, School Board President and Chancellor Irving Anker to Mr. Albert Hamlin, Acting Director, Office of Civil Rights, dated April 22, 1977. (Exhibit 12)

C. Document Board of Education of the City of New York Division of Personnel—Bureau of Professional Liason and Staffing: *Schools Eligible for Alternative Selection Methods.* (Exhibit 13)

D. Document, Board of Education of the City of New York, dated November, 1975. *Seniority and Layoffs. A Review of Recent Court Decisions and Their Possible Impact on the New York City Public School System, Working Note No. 1 in a Series Assuring Equal Employment Opportunities in the City School District of New York.* (Exhibit 14) (On March 31, 1976 Dr. Bernard Esrig, Special Assistant to Dr. Gifford, informed the Office for Civil Rights, that the race/ethnicity of persons appointed under the NTE option was determined by a telephone survey.)

E. Document, Board of Education of the City of New York, Division of Personnel, dated March 26, 1974: *Persons Appointed Under the NTE Process.* (Exhibit 15)

F. New York City School System, Breakdown by Race, School Years 1971/2-1975/6, Students, dated 30 September 1975. (Exhibit 16)

G. New York City School System, Breakdown by Race, School Years 1971/2-1975/6, Full-Time Teachers, dated 30 September 1976. (Exhibit 17)

H. New York City School System, Totals 1971/1972 thru 1975-1976, dated 26 October 1976. (Exhibit 18)

I. New York City School System, Professional Staff and Student Ethnicity Illustrated by District, 1975-1976, dated 30 September 1976. (Exhibit 19)

J. New York City School System, Professional Staff Assignment by Ethnicity Illustrated by Schools in Quartiles of Student Ethnicity, 1975-76, dated 30 September 1976. (Exhibit 20)

4. Prior to September 15, 1977 I received the following documents:

A. *Race, Ethnicity, and Equal Employment Opportunity: An Investigation of Access to Employment and Assignment of Professional Personnel in New York City's Public Schools. Working Note No. 2 in a Series. Assuring Equal Employment Opportunities in the City School District of New York, June 1977, Board of Education of the City of New York.* (Exhibit 21).

B. *Board of Education of the City of New York Office of the Chancellor, Revised Copy August 9, 1977, Supporting Data Requested by Dr. Herman Goldberg at Meeting of July 22, 1977 to Show Cause for Revocation of Ineligibility for 1977-1978 ESAA Funds to the Central Board of Education of the City of New York.* (Same as Exhibit 6, Affidavit of Herman Goldberg.)

5. By letter dated July 6, 1977 to Chancellor Irving Anker (Exhibit 22) this office extended its efforts to provide assistance to the Central Board and all Community School Districts to develop acceptable plans to come into compliance with the waiver requirements of the Act.

6. My office has consistently apprised the Central Board and Community School Boards that voluntary compliance with provisions of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendment of 1972 would not in themselves insure compliance with specific requirements of the Emergency School Aid Act. (See Exhibit 23)

DAVID S. TATEL

District of Columbia)
City of Washington)

Subscribed to and sworn to before me this 26th day of October, 1977.

LORRAINE HALLOWAY
Notary Public
My Commission Expires Jan. 1, 1978

Transcript of Proceedings Before Weinstein, J.
Dated 10/31/77

[Pages 10-13]

I must say that I am reluctant but I am going to have to grant the Government's motion for summary judgment.

I find that the Government's position here is difficult for me to understand, but I don't believe I have any alternative.

This constitutes my findings.

Based on the facts before me, Plaintiffs allege that the denial by the United States Department of Health, Education and Welfare of their applications for funds under the Emergency School Aid Act (ESAA), 20 United States Code, Section 1601, etc., violates that Act and is arbitrary, capricious and illegal in violation of The Administrative Procedure Act, 5 U.S.C., Section 702, etc. They seek injunctive relief.

The imagination and tenacity with which HEW is enforcing its legal obligation to insure that Federal funds are not used to foster racial discrimination in education is admirable. Nevertheless, the enormous power that control of the purse gives the Washington bureaucracy must be exercised with meticulous regard for local rights lest it be used abusively to punish local school boards (and the children they educate) for racial situations the localities do not condone and are seeking to eliminate.

Denial of the funds involved in this litigation are based on findings by HEW that teachers in New York City are assigned by the Board of Education in a racially discriminatory manner.

In support of this finding, the defendants argued in this Court that the City's agreement of September 9, 1977, with HEW, designed to reduce racial disparities in teacher

school assignments, is a concession that teacher allocations have been made illegally in the past. But this agreement was in the nature of a consent judgment without any concession by the City of illegality. Apparently, it was entered into under the threat of massive withholding of Federal funds. To use this agreement as the evidentiary basis for withholding separate educational funds is quite unfair. This purported justification for finding Plaintiffs guilty of racial discrimination in teacher assignment is without merit. Similarly without merit the City's contention that because HEW allowed funds under ESAA to individual school boards that it was required to allow funds to the Central School Board. The allowance may be due to certain compromises or it may have been due to a decision by the same Administrator which was inconsistent with the decision here. Nevertheless, consistency is not required as long as there is a reasonable basis for decision.

Based on the record, a decision by the Administrator to allow ESAA funds to the City, would certainly have been upheld, since the City made a very good case to show that it had not engaged in a pattern or practice or policy or procedure after 1972, that is June 23, 1972, designed for segregation purposes.

But on the other hand, there was a reasonable basis for a decision that it had so discriminated. This Court's powers are extremely limited. In this respect, considering the high school statistics, the State statutes, the United Federation of Teachers agreements, the wishes of individual Black principals, the desires of the individual Parent-Teachers Associations, community school board and Black and White communities, the Administrator could find a

practice, policy or procedure after June 23, 1972, resulting in the identification of schools as intended for students of a particular race, color or national origin through the assignment of teachers to those schools.

Accordingly, with the greatest reluctance because it is the children of the schools who will suffer from this decision of the Administrator, the Court grants the Government's motion for summary judgment.

Ms. Carroll: Your Honor, will there be a specific ruling on the District 11 application since the facts that affect the Government's denial of that application are different from those with respect to the Board of Education?

The Court: Why did you deny District 11? What is there about District 11? What is there different about District 11 as against other districts?

Mr. Glassman: The other individual districts came into compliance by reassigning their teachers within their own school district and there was a specific waiver of regulations and we were able to fund them. But District 11 chose not to do so.

The Court: Teachers were not reassigned within the district?

Mr. Glassman: No, they have not been, your Honor.

The Court: Is that so?

Order of Weinstein, J. Dated 11/1/77

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 77 C 1928

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,

Plaintiffs,

—against—

JOSEPH CALIFANO, SECRETARY, United States Department of Health, Education and Welfare, *et al.*,

Defendants.

ORDER

This cause having come on to be heard before the undersigned United States District Judge on the 31st day of October, 1977, upon cross-motions for summary judgment by plaintiffs and defendants, and David G. Trager, United States Attorney for the Eastern District of New York by Richard P. Caro and Rodger C. Field, Assistant United States Attorneys, Jeremiah Glassman, Department of Justice, of counsel, having appeared on behalf of defendants, and Hon. W. Bernard Richland, Corporation Counsel, City of New York, by Rosemary Caroll, Assistant Corporation Counsel, having appeared for plaintiffs, and the court having heard and considered arguments of counsel, and upon the findings of fact and conclusions of law set forth in the record, and upon all of the pleadings and papers herein, it is hereby:

Order of Weinstein, J. Dated 11/1/77

ORDERED, ADJUDGED AND DECREED, that the motion for summary judgment of plaintiff, Community School Board of Community School District #11, is in all respects granted, and it is further

ORDERED, that the motion for summary judgment of defendants is in all respects granted with respect to all other plaintiffs herein, and it is further

ORDERED, that the temporary restraining order previously entered in this action on September 29, 1977 and subsequently extended by an order dated October 6, 1977 is hereby extended until ten days from the date of this order, pending further order of this Court, and it is further

ORDERED, that a motion for reconsideration by any party may be made within ten days of the date of this order.

Dated: Brooklyn, New York
October 31, 1977

JACK B. WEINSTEIN
U.S.D.J.

Letter to Irving Anker Dated 12/9/77

(Seal)

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON, D.C. 20202

DEC 9 1977

Chancellor Irving Anker
Board of Education of the
City of New York
110 Livingston Street
Brooklyn, New York 11201

Dear Chancellor Anker:

As you are aware, the matter of your district's ineligibility for Emergency School Aid Act (ESAA) funding for school year 1977-78 has been remanded to the Department of Health, Education, and Welfare by the United States District Court for the Eastern District of New York. In his opinion, dated November 18, 1977, Judge Weinstein designated the issue on remand to be whether your district is ineligible on the ground of discrimination in the assignment of teachers on the basis of race, color, or national origin. The evidentiary basis for the determination of ineligibility on that ground was described in our letter to you of July 1, 1977.

Pursuant to Judge Weinstein's opinion and order, this notice is to give your district a new opportunity to show cause why the determination of ineligibility pursuant to

Letter to Irving Anker Dated 12/9/77

20 U.S.C. §1605(d)(1)(B) and the HEW regulation 45 C.F.R. 185.43(b)(2) should be revoked.

If you notify us that it is your desire to take advantage of this opportunity an informal meeting for that purpose will be convened at 10:30 a.m. on Friday December 16, 1977, in Room 2001, Federal Office Building #6, 400 Maryland Avenue, S.W., Washington, D.C. No reporter or transcript will be provided.

Pursuant to Judge Weinstein's order, the standard which will be used to determine whether your district has discriminated in violation of ESAA is whether: (1) the school board was maintaining an illegally segregated school system on June 23, 1972 and it took no effective steps to desegregate after that date, or (2) it had a practice after June 23, 1972, that was segregative in intent, design or foreseeable effect. At the informal meeting you may submit all evidence which is relevant to these standards and we will consider it.

Since we are informed by the Office for Civil Rights that it is now engaged in a review of your district's response to its letter of October 4, 1977, we do not construe that letter as containing the basis for a final finding of racial discrimination which you should address at the informal meeting.

Sincerely,

HERMAN R. GOLDBERG
Herman R. Goldberg
Associate Commissioner
Equal Education Opportunity
Programs

Affidavit of Irving Anker Dated 1/4/78

UNITED STATES DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

In the Matter of the Application of the City School District of the City of New York for 1977-78 Funding under the Emergency School Aid Act

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

IRVING ANKER, being duly sworn, deposes and says:

1. I am the Chancellor of the City School District of the City of New York and having knowledge of the facts as set forth hereafter submit this affidavit in support of its 1977-78 application for funds under the Emergency School Aid Act (ESAA).

2. By letter dated July 1, 1977, I was notified that the Board's 1977-78 ESAA application was denied on several grounds (Exhibit "1").

3. In the interim, HEW has either settled, revoked or decided not to advance all other grounds for ESAA ineligibility alleged in that letter and now solely asserts violation of 45 C.F.R. 185.43(b)(2) in teacher assignment as the basis for ineligibility, that is, that ethnic teacher staff statistics evidence a pattern of assignment from which

it is "possible: to identify schools as intended for students of a particular race, color or national origin."

4. The number of minority teachers and their distribution primarily resulted from and were affected by nondiscriminatory factors such as demographic changes in the student population of the City schools; state law; collective-bargaining agreements' neutral date of hire seniority practices; minority incidence in the relevant available work force; and incidence and distribution of vacancies in specific teacher license areas.

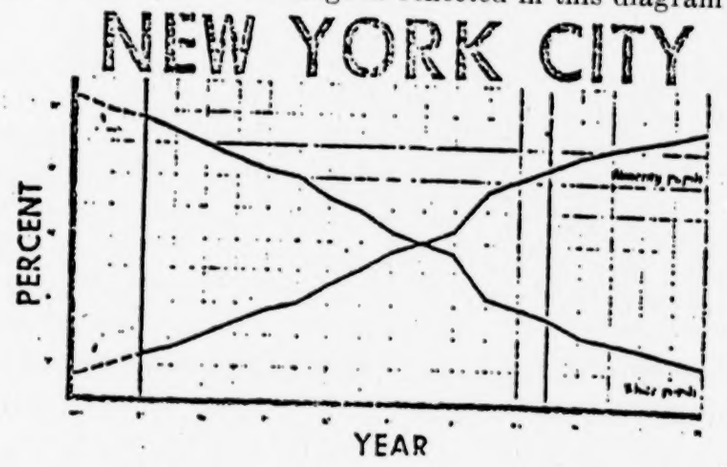
4. *Student Population.* Over the last 20 years a constant and irreversible trend has emerged in New York City comparable to that experienced in many major urban school systems: the City School district formerly integrated and with a high incidence of non-minority students has become increasingly minority. (See Board ESAA Plan, 1977-78.)

Factors beyond the control of the school system affected the ethnic student balance of New York City Schools: employment rate, especially among unskilled workers, increased incidence and cost of welfare, significant migration of minorities to New York City, increased enrollment of non-minority students in non-public schools and the exodus of whites from the City. For example, the net migration of non-whites to New York City for 1960-70 was 915,566, while the net emigration of whites was 702,699. (Ibid., III, p. 8).

The difficulty of effecting ethnic student balance within schools, already magnified by this demographic trend, is further heightened by housing patterns reflecting broad geographic concentrations of minority groups in the Bronx, Manhattan and most recently in Brooklyn.

The housing pattern in Brooklyn is characteristic of the situation city-wide. Formerly, areas of Black and Puerto Rican concentrations were separated from each other by areas of white population. Over the last 10 years the areas of minority group concentration have tended to merge so that fringe areas low in non-minority populations now separate minority concentrations. The net result is few concentrations of contiguous minority and non-minority concentrations available for racial balance in the local schools.

Perhaps the most dramatic evidence of the population change is reflected in the school attendance figures for the last 20 years. In 1957, the New York City student population was 68.3% non-minority; in 1975, 32.1% non-minority. In the elementary schools, student population was 64.4% non-minority; in 1975, 30.2% non-minority. In the Junior High Schools the student population decreased from 65.0% non-minority in 1957 to 30.1% non-minority in 1975. The rapidity of the transformation is evidenced by population statistics for the high schools where a 79% non-minority student population in 1960 has been drastically reduced in 1975 to 37.4%. The change is reflected in this diagram:



5. *Zoning for Racial Balance.* Recognizing this emerging trend in student population, as early as 1954, the Board adopted a Plan for Integration in New York City Schools which has embraced various innovative strategies to improve quality integrated education and reduce minority student isolation. A Division of Zoning and Integration was established to implement and watch-dog school site selection, open enrollment, pairing of ethnically disparate schools, and school feeder patterns and rezonings for racial balance. Heterogeneous student group practices and staff and student training in inter-group relations were adopted to diminish minority student isolation and racial strife. (See ESAA Plan, pp. 16-100).

In the high schools, which offer the greatest potential for integrated education, the Board has adopted policies which encourage minority students to attend non-minority dominant high schools, but which preclude such transfers by non-minority students. Thus under an Open Admissions Plan schools at least 65% minority are "sending" schools while schools which are integrated or predominantly non-minority are "receiving" schools. (Ibid., pp. 66-68).

Recognizing that the system as a whole has become so overwhelmingly minority in student population as to preclude integration in all schools by any program of student population shifting, the Board has recently concentrated its efforts on stabilizing and maintaining those schools which are approaching the 50% minority student level. These schools offer the best chance for quality integrated education. (Ibid., pp. 73-83).

6. Staff of the Department of Education and the ESAA plan itself at no time required statistics on either the

ethnic incidence or distribution of staff to the public schools and it is for this reason that the Board's ESAA plan contains no staffing statistics.

7. In fact, HEW has employed a shifting and inconsistent standard in reviewing the Board's ESAA application as regards statutory requirements for ethnic staffing. For example, the OCR report referred to in the July 1, 1977 letter of ineligibility, found objectionable the disparity between the percentage of minority students and the percentage of minority teachers in the New York City Public Schools. In rebuttal, we pointed out that since teacher candidates are derived from the available work force and not the student population, the objection was obviously groundless. Moreover, an *exact* matching of student and teacher ethnicity is inconsistent with the ESAA requirement of non-segregated educational systems. Additionally, even in 1970, the minority teacher hire rate approximated the percentage of minority individuals in the relevant labor pool of college graduates, as per available population statistics.

8. Apparently abandoning this comparison of teacher-student ethnicity as the basis for determining whether the assignment of teachers violated ESAA, HEW then examined statistical data on the system-wide distribution of teachers and concluded that the assignment of teachers was discriminatory not because the percentage of minority students differed significantly from the percentage of minority teachers as previously urged but rather, because some schools appeared to be more ethnically homogeneous than others in their student and staffing populations. From

these statistics alone it was concluded that some schools were identified as intended for students of a particular race, color or national origin in violation of ESAA. That conclusion is unwarranted. Teacher appointments and assignments result from policy factors, including state law procedures which do not discriminate on the basis of race, color or national origin.

9. *State Law.* All teacher assignments in New York City Public Schools until 1970 were made pursuant to the provisions of Education Law §2569, and §2573(10). Under that statutory scheme, the Chancellor requested (Educ. L. §2573(2) the Board of Examiners to conduct competitive examinations for pedagogical licenses and promulgate lists of candidates ranked in order of performance on the examinations (Educ. L. §2569) which are then certified to the Board for permanent appointment and assignment of teachers in rank order. (Educ. L. §2573(10a)). Additionally, substitute licenses were issued pursuant to State Law for temporary staffing of schools. Eligible lists do not describe nor identify the race, color or national origin of candidates for pedagogical assignments.

This statutory scheme (Educ. L. §§2569, 2573) was the sole method of teacher appointment and assignment until the legislative revisions of the Education Law in 1969.

10. *State Law Amendments.* In 1969, the percentage of minority teachers in the school system was approximately 7%, the percentage of minority students almost 60%. Thus, a dynamically increasing minority student population was met with a relatively static minority teacher hire rate.

Effective September 1969, the New York City School System was restructured into 32 decentralized Community School Districts which, subject to the powers retained by the Central Board and the Chancellor, were authorized to appoint and assign teachers. (Article 52-A, Educ. L., §2590-e(2)).

In the same year Education Law §2590-j was amended to permit the appointment and assignment of teachers regardless of candidate ranking on eligible lists to schools where the reading level is below the 45 percentile of reading scores for the City School District. (Educ. L. §2590-j 5(b)). Additionally, the Education Law was amended to permit the appointment of persons who passed the National Teachers Examination (NTE) to teaching positions in 45 percentile schools. (Educ. L. §2590-j 5(C) and (C)(1)).

These amendments established a qualifying examination rather than a ranked competitive examination as an alternative method of teacher assignment to elementary and junior high schools in community school districts where reading scores were below the 45% of City-wide reading tests.

11. *Purposes sought to be achieved by amendments.* These amendments, so fundamentally transforming the appointment and assignment process in the New York City School District, of necessity required the cooperation and served the needs of diverse elements in the educational community.

The enactment of decentralization and alternative methods for teacher appointment primarily addressed these concerns: (1) improvement of pupil reading achievement levels, hence the inclusion of 45 percentile schools, (2) maximization of opportunity for community control-based solutions to problems of disparate student educational

achievement, (3) elimination of a developing over-dependence on substitute assignments for minority dominant school staffing, and (4) expansion of the number of minority teachers in the New York City School System.

It is clear that the legislators intended to improve minority teacher representation in the school system. Among the statements illustrative of this point was the following made by Senator Zaretski: "We retain the Board of Examiners, but when we come to the lower 45% as measured by the reading ability of the schools of the City of New York—the lower 45 percent, it is almost a half; you either take the central board list or you have a special qualifying list which is much easier to get, and so it will be much easier to fill by the local school boards. For those who want teachers from the minority groups, they will be able to get them from this qualifying list. And then you have the National Teachers' exam plus state certification—all in this bill."

Use of the NTE and a qualifying rather than competitive candidate pool for teacher assignments was adopted upon analysis of evidence developed by the Board that where these alternative selection procedures were used in various other school districts in the United States, minority teacher hire rates increased.

A more purely educational consideration also affected the Board's support of these amendments to the Education Law. In the mid-sixties there evolved an educational consensus, most strongly embraced by minority educators, that the problem of low minority student achievement should be addressed at least experimentally, by exploring the impact of minority teacher role model on minority educational achievement.

12. *Impact of state law amendments on minority hire rate.* Utilization of these alternative procedures resulted in a dramatic percentage change in the number of minority teachers:

Ethnic Census of Teacher Staff
Total—New York City
Increase/Decrease from 1970-1971 to 1974-1975

Ethnic Group	*1970-1971*	*1974-1975*	*No. Change*	*% Change*
Black	4,601	5,229	+698	+15.2%
Oriental	211	299	+88	+41.7%
Hispanic	803	1,707	+904	+112.6%
(Sub-Total Minority)	(5,625)	(7,316)	(+1,691)	(+30.1%)
Other	54,060	49,110	—5,950	—11.0%
Total	59,675	55,415	—4,250	—7.1%

The full time minority professional staff, including principals, assistant principals, reading and other instructional staff, has similarly increased from 1970-1975 by +26.6%. (See Exhibit VI—Ethnic Composition of Professional Staff 1970-1975).

13. *Court order and collective bargaining agreements.* Regarding the apparent concentration of Hispanic teachers in schools with high concentrations of Hispanic students, implementation of the consent decree in *Aspira of New York v. Board of Education, et al.*, 72 Civ. 4002, requiring the provision of bilingual instruction to Spanish-language dominant children has resulted in the challenged concen-

tration and not discriminatory purposes or practices. And, for the period 1970-1975, the percent increase of Hispanic teachers is 112.6%.

Additionally, provisions of applicable collective bargaining agreements entitle teachers to assignments within the school system based upon neutral date-of-hire seniority as vacancies accrue. As part of our continuing effort to achieve quality integrated education, the Board has adopted a teacher assignment plan for the 1977 school year by which non-minority teachers now on lay-off will be assigned to districts with high concentration of minority teachers, and, conversely, school districts with high concentrations of minority teachers will be assigned to non-minority teachers. Because these teachers are on lay-off there is neither contractual nor statutory bar to this assignment plan.

14. It has been the consistent policy of the New York City Board of Education to afford quality integrated education in the City School District, now a minority student dominant District. Factors basically neutral but resulting in distribution and incidence disparities have curtailed the Board's ability to effect innovative integration strategies. But, there has been no policy practice or procedure designated to identify schools within the 32 Community School Districts as intended for students of a particular race, color or national origin.

15. The July 1, 1977 letter suggests that there is a pattern of assignments in the community school districts, illustrated by the ethnic staffing statistics for community school districts 5, 3, 31 and 26, which violates ESAA and the applicable regulations.

16. As stated above, staffing decisions for schools within these community school districts, and all other districts, is vested in the community school boards and not in the Board.

17. HEW has not found the community districts to be ineligible for funding: Districts 3 and 26 were approved for funding, District 5 was a quality reject, and District 31 did not apply.

18. In fact, HEW has found every community school board applicant eligible for ESAA funding other than District 11.

19. The Board has supported the goal of increasing opportunities for minority employment in the school system through minority recruitment, development of a career plan for para-professionals and broadening of teacher selection criteria. It has at the same time implemented standardized selection procedures to actualize the commitment to equal employment opportunity for all applicants for employment.

20. There is no basis in logic or reason for holding the Board ineligible for ESAA funding based upon alleged discrimination in teacher assignments in community school districts since such assignments are not made by the Board and since defendants have found all community school boards applicants eligible for 1977-78 ESAA funding.

21. Defendant Goldberg's July 1, 1977 letter similarly charges that a pattern exists in the assignment of teachers to high schools which violates 45 C.F.R. §185.43(b)(2) in

that it is "possible" based upon composition of their teaching staff to identify high schools as intended for either minority or non-minority students.

22. An analysis of the staffing of New York City high schools must begin with the observation that following World War II and continuing through the 1970's, New York City and virtually every other major city in the United States, experienced a mass exodus of middle class whites to the surrounding suburbs. The ethnicity of the student population of the New York City high schools reflects the trend from a system whose student population was overwhelmingly non-minority (69.7% in 1959) to a predominantly minority student population, 62% projected for 1977-78. (See Board's ESAA Plan extract contrasting base year 1959-60 to project year 1977-78.)

23. Each borough of the City has experienced this demographic phenomena and differs only in the percentage of completion of the process. Thus, Manhattan by 1976, had virtually exhausted the process with a resulting white student population of 5%.* Bronx is well along the way with 18%, Brooklyn is at 37% and Queens is at 52%. Projections for the 1980-81 school year for the high schools in Queens, which has the greatest non-minority student population, is 35% non-minority. Thus, the charge that certain high schools are intended for children of a particular race, color or national origin, must be examined in the context of the demographic changes which have transformed the student population of the high schools.

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* Figures are for academic high schools.

24. The Board's ESAA plan outlines the various strategies developed by the Office of Zoning and Integration to foster racial balance and eliminate or prevent minority student isolation. These zoning efforts document the Board's continuous commitment to integration in the high schools.

25. Attached to defendant Goldberg's letter of July 1, 1977, is a list of 39 high schools cited as having student and teacher ethnicity levels which "possibly" indicate that these high schools are intended for students of a particular race, color or national origin. A school by school analysis of this list proves that such inference was entirely unfounded.

26. Turning to that list Harlem, Park East, Harlem Prep, Lower East Side Prep, Satelite Academy, Pacific, Redirection and Auxiliary Services are all independent alternative high schools. They should not properly be part of an analysis of staffing pattern in New York City high schools because the unique historical development of these schools, the exceptional methods of teacher selection, their special educational programs and curriculum all preclude comparison with other high schools.

27. The students in these schools have all dropped out of other schools. Because of various impediments to learning such as drug addiction, pregnancy, criminal records, or more generalized social maladjustment these students require curriculum programs and counselling different in focus and concentration from that offered in other high schools. The schools themselves were originally private community schools. They have traditionally offered personalized guidance services, flexible curriculum and stag-

gered teacher hours geared to the special needs of their students. For example, many of these schools operate into the evening hours. Teachers, thus, must be willing to work long and inconvenient hours. They must be motivated to develop contacts in the community, participate in family counselling and in general perform a myriad of duties which reflect a pervasive commitment to teaching children with special problems that affect their ability to learn. Recognizing the degree of teacher commitment necessary to meet the challenge at these special schools, the Board relies solely upon voluntary applications for staffing these alternative schools. There is, thus, no comparability between these schools or their teaching staffs and other high schools.

28. Returning to the HEW list of high schools. Bushwick and Eastern District High Schools both have high concentrations of Hispanic children who are non-English dominant. These schools provide the *Aspira* consent decree program, Title VII Bilingual Programs and English as a Second Language Programs (E.S.L.). Of the 130 teachers at Eastern District, 16 are Hispanic. Even using HEW's mathematical method of determining discrimination, subtractig these 16 teachers from the 13.0% minority teachers at that school puts its staffing level to the 8.3% high school-wide minority teacher population. Similarly, of Bushwick High School's 146 teachers, 6 are Hispanic. Subtracting these teachers from the minority teacher percentage puts that school's minority teacher percentage within 5% of the 8.3% figure.

29. The Board is required to provide the *Aspira* program to all eligible children and has consequently had to hire bilingual staff on an expedited basis. The educational justification for a resulting concentration of Hispanic teachers in schools with high percentages of Hispanic children requires no further elaboration.

30. August Martin High School, succeeded Woodrow Wilson High School in Southeastern Queens and was, when opened in 1971, the only magnet thematic school in the City. The theory of a magnet school is that by developing a curriculum around an innovative educational theme students of all backgrounds will be attracted to attend the school. August Martin's location near John F. Kennedy International Airport, made it an ideal site for a magnet school emphasizing aerospace studies.

31. Teachers generally were selected from eligible lists to fill staff positions at August Martin but in instances where there were no licenses for specific aerospace subjects recruitment of persons with the most related backgrounds was undertaken. For example, there is no license in flying instructions—but, a common branches teacher with a flight instruction service was hired and 150 students, in fact, fly planes as part of the program. Similar selections were made for avionics, radio communication and other courses for which there are no specific licenses.

32. The school is located in a largely black middle class area has a high attendance rate of 91% and 90% of its students go on to college. It has a work-study cycle at Kennedy airport providing jobs in airplane maintenance, repair and airline clerical and reception work. It has 6 Title I teachers, all of whom are monitored by Title I com-

pliance teams. Many of the minority teachers have been part of the school staff since the time it was Wilson High School, that is, for over six-eight years.

33. In assigning teachers to the innovative programs at this school, the Board has not assigned teachers on the basis of race, but, rather, on the basis of possession of specific licenses in subject areas to be taught or by assignment of persons with relevant experience and most comparable licenses.

Subtracting the number of minority teachers in these high schools from the minority teacher total system-wide there are only 7.3% of all teachers who are minority group individuals to be distributed throughout the system, or conversely, a system that is 92.7% non-minority. Even with this small percentage available for distribution, there are virtually no high schools which do not fall within an acceptable range of deviation.

34. Returning to the list of high schools again, 23 of the 39 schools are integrated schools, that is, the percentage of non-minority students there is at least 50%. As such, they cannot be identified as intended for children of a particular race, color or national origin. See 45 C.F.R. §185.01(g). Moreover, a careful analysis of these integrated high schools reveals that those schools with the lowest percent of minority children, New Dorp 4.3%, Tottenville 13.0%, Ralph McKee 19.1%, are all geographically isolated, located in Staten Island, where the percentage of minority students is approximately 14.5%.

35. The Board operates 110 secondary schools in the five boroughs of the City with a student population of 315,000. During the 1975-76 school year, 8.3% of the teachers in the high schools were minority group members.

36. The high school staffing pattern reflects the academic subject matter or vocational courses offered at the specific high school. Generally, the license areas with the fewest number of qualified and licensed teachers are mathematics, chemistry, physics, English and most recently, Spanish and Hebrew. Eligible lists for these areas are completely exhausted and recertifications and even substitute licensed staff are recruited to fill such vacancies. For the bilingual areas, license examinations were developed only recently. On the other hand, some license areas traditionally have had greater numbers of licensed minority teachers than other. For example, the minority passing rate for English H.S. license was relatively high, 43% (1968) and 49.23% (1974) and for Social Studies H.S. license, low 00.00% (1968) and 7.69% (1974). Also, there is a greater incidence of minority group members possessing pedagogical licenses in home economics, cosmetology, and nursing, than for example in math, physics or chemistry.

37. The high school staffing pattern also reflects the yearly teacher attrition rate, and teacher transfers. Schools with average teacher longevity of 10-15 years will more often be predominantly white than minority in teaching staff since the percentage of minority teachers with college degrees at that earlier period was even lower than the current 6% of all college graduates who are minority group members.

38. The existence of these factors affecting distribution precludes a random distribution of the 7.3% of minority teachers in every high school. Moreover, I can not agree with HEW's notion that achievement of such percentage distribution means that there is no discrimination. Tokenistic percentages may well mask blatant discrimination.

39. For example, many neutral factors affect the percentage of minority teachers at Jane Addams Vocational High School in the Bronx. The school is located in one of the most blighted areas of the South Bronx. While it is an open enrollment school, the number of white student transferees into it are negligible. The school has 80 teachers, for a student enrollment of 1,500. It has a Title I program, with 2 minority teachers. The major concentration of minority teachers in this school are in the Nursing Department with average teacher seniority of ten (10) years for 14 of the 18 black teachers. (In fact, the most recently excessed* teachers were non-minority.) The attrition rate is low, less than 3 teachers a year. The concentration of minority teachers at this vocational school does not result from discriminatory assignment; it results primarily from the fact that many local minority students enroll in the nursing program and that there is a concentration of minority group women in the nursing profession who have received licenses to teach nursing.

40. The three remaining high schools in Manhattan, Benjamin Franklin, Murry Bergtraum and Martin Luther King, Jr. are all located in the Borough of Manhattan where the percentage of non-minority children is 5%. While children zoned to those schools may attend non-minority dominant high schools under choice of admission programs, the percentage of students exercising that option has not significantly lessened minority student concentrations there.

41. Murry Bergtraum High School for Business Careers and Martin Luther King, Jr. High School are both new

* Least senior teachers are transferred when reductions in student enrollment require reduction in number of teachers on staff.

schools opened in September, 1975. As new schools they are entitled to recruit 35% of staff by voluntary transfer of teachers from other schools and by new hires.

42. Many of the voluntary teacher transfers to these schools were minority professionals who were eager to have the opportunity of working with minority children. Both schools have *Aspira,* Title VII and English as a Second Language programs. The need for such programs is especially obvious at Bergtraum, located in the lower east side of Manhattan just north of the Brooklyn Bridge in an area populated by Spanish, Chinese, Japanese, French, Portuguese and Italian children.

43. Moreover, contrary to HEW's contention, King has 11% minority teachers and Bergtraum 13% minority teachers. This percentage of the teaching staff is clearly within HEW's 8.3% quota.

44. Benjamin Franklin High School is located on the FDR Drive in East Harlem. The teacher staffing pattern is affected by its geographic isolation, the high degree of crime in the area and the long walk from the nearest subway to the school. These factors contribute to a rather high teacher turnover and absentee rate. On the other hand, because of the high concentration of Spanish language dominant youngsters and the existence of the *Aspira* program there has been a significant increase in the number of Hispanic teachers at the school.

45. In staffing these schools, however, the Board of Education has not earmarked them as schools intended for children of a particular race, color or national origin. Moreover, given the overwhelming minority student con-

centration in Manhattan (95%) an imposed ethnic quota in these schools of 8.3% as sought by HEW is educationally pointless.

46. As the affidavit of Rufus Thomas, which is submitted herewith, demonstrates the matter of staffing each High School involves, *inter alia,* factors of availability, geography, license, prime, vacancies and seniority.

47. The actual individual facts for each high show that there has not been purposive discrimination and that uniformed reliance on statistics alone is entirely inappropriate to the resolution of so complicated a matter.

48. The high school system in New York is large, complex and diverse. It addresses the various educational and social needs of a population that ranges from poverty level to middle class. A myriad of variables affect teacher assignment and preclude mathematic exactness in distribution of minority teachers. I urge HEW to examine the facts for each school. Then it must conclude that computer printout alone can not be relied upon and that the City School District is entitled to funds to supplement its continuing efforts to achieve quality integrated education.

/s/ Irving Anker
Irving Anker

Sworn to before me this
4 day of January, 1978.

Joel W. Gellar
Notary Public, State of New York
No. [illegible]
Qualified in Kings County
Commission Expires March 30, 1978

Affidavit of Rufus Thomas Dated 1/4/78

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

In the Matter of the Application of the City School District of The City of New York for 1977-78 ESAA Funding.

Affidavit

State of New York
County of ss.:

Rufus Thomas, being duly sworn, deposes and says:

1. I am the Unit Head of the Centralized License Unit of the Office of Pedagogical Personnel, and having knowledge of the facts as stated hereafter, submit this affidavit in support of the City School District of the City of New York's 1977-78 application for ESAA funding.

2. The Office of Pedagogical Personnel has sole responsibility for pedagogical appointments to the high schools in the City School District. As Unit Head, I am responsible, *inter alia,* for the supervision and co-ordination of these appointments.

3. From my experience in this division, I can assure HEW that statistics of ethnic distribution of high school teachers merely describe the status quo. They do not, in any manner begin to elucidate the reasons for the staffing patterns that have developed in the New York City High

Schools. In such a complex urban school district consideration of those factors and their impact on hiring is essential to a valid evaluation of the inference to be drawn from statistics.

4. I will exclude from my comments the factor of demographic changes in the student population of the high schools explored in the Anker affidavit. Instead I will focus closely on the appointment process and its operation in the context of the on-going operation of particular high schools to elucidate the myriad factors which affect the staffing patterns in the New York City High Schools.

5. Preliminarily, the Office of Pedagogical Personnel receives status reports from high school principals usually semi-annually at the commencement of each new school term, listing the number of vacancies and/or excessed positions in each high school for that term. After review by my staff, wherever possible, teachers scheduled to be excessed will fill vacancies in the same high school where sufficient similarity of license permits.

6. Upon receipt of this information, and after the number and nature of vacancies and/or excessed* positions is verified, and intraschool adjustments made, the Office of Pedagogical Personnel draws from lists of licensed areas in rank order, and assigns such persons to the high schools based upon verified vacancies. The 45% out of rank

* Excessing denotes the number of teachers in excess of prescribed teacher quotas based on student enrollment. Where enrollment declines schools are required to transfer or excess the least senior employees to receiving schools, that is, schools which have vacancies to be filled.

order and NTE exceptions do not apply to the centralized high schools.

7. In addition to the assignment procedures described above, assignments are affected by teachers who, having served for five years may request transfers once yearly, at May 15th. Further, teacher assignments result from requests for hardship transfers, that is a request for assignment to a high school for which the commuting time does not exceed one and one-half hours from their residence to high school of employment.

8. Thus, each semester, there is a reorganization of the high school teacher staff based upon accrued vacancies, excess positions, voluntary transfers, and hardship transfers.

9. The teacher staffing situation in the high schools is also affected by the incidence of other factors largely beyond the control of the Office of Personnel, and which affect the appointment process. For example, Boys and Girls High Schools in the Bedford Stuyvesant area of Brooklyn, has had a chronic teacher turnover rate. The number of vacancies for these schools has consistently exceeded the norm for vacancies system-wide, and, as in all difficult to staff schools, the vacancy problem is not static, that is, it continues throughout the school year so that 60% of its vacancies are filled during the term. Thus, Boys and Girls High Schools have experienced teacher vacancies as indicated below:

Total	*Year*
34 vacancies in	September 1972
31	February 1973
20	September 1973
N. R.*	February 1974
21	July 1974
38	February 1975
40	September 1975
N. R.*	February 1976
50	September 1976
20	February 1977
39	September 1977

* No records submitted

10. Another factor affecting teacher assignment at Boys and Girls High Schools is teacher security. Presently, 18 school guards and two police officers are assigned to the school to maintain security. Nevertheless, the number of assaults on staff in that school for the 1975-76 school year totalled 78. Records of vandalism to teacher property, including automobiles, are not maintained by the Board of Education, but my conversations with both the school principal, and staff members, indicates a high incidence of vandalism and theft. The school itself is located a long walk away from public transportation, in one of the highest crime precincts in the Borough of Brooklyn. Thus, for every vacancy at Boys High School this office must, on an average, notify between 7 and 15 potential applicants. For the vacancy in an English teacher position, 30 applicants had to be notified before the position could be filled. Even with this extensive recruitment effort, there has continuously been a problem in effecting permanent teacher ap-

pointments there, and the school has been staffed largely with substitute teachers.

11. The procedure for appointment of teachers is (1) notification of appointment to the school, and (2) certification of appointment, that is, that the appointee actually took the position offered. Where an individual indicates that he (she) cannot take the appointment at any school, he (she) must furnish my office with proof that such declination does not result from personal choice but rather emanates from a legitimate disability, such as an actual contract of other employment, medical proof of physical disability, pregnancy, or actual matriculation in a college or university that is verified by an official school transcript, or letter of certification of matriculation. Annexed hereto as Exhibit "A" are the forms utilized by the Centralized License Unit in certifying the bona fides of appointee declinations.

12. It should be observed, for example, that the declination of an assignment to Boys and Girls High School on the ground of other employment must be verified by a contract to be submitted by the appointee. (See Exhibit "A", p. 2).

13. Where an individual submits an explanation for declination which does not meet the standards described above, that individual's name is permanently removed from the list of persons to be appointed. No further appointments and offers will be made to him or her.

14. New Utrecht High School, which has had virtually no teacher turnover during the period 1972 to the present, and no staff assaults whatsoever for the 1971-76 and 1976-

77 school years, presents the staffing situation virtually opposite to that experienced at Boys and Girls High School. For example, for the period February 1973 to date, there have been requests for only one regular appointment to that school. Thus, statistics on the staffing pattern in those schools alone cannot provide any indication of the different circumstances surrounding the actual implementation of appointments.

14. (sic) It is, of course, evident that given the small number of minority individuals with high school license available for appointment, it is virtually impossible to assure the exact percentage homogeneity throughout the entire system, given, among other things, variety of vacancies that occur. Prior to 1977, this Unit did not maintain statistics on ethnicity of teacher appointments.

15. In the predominantly non-minority high schools, other than those in Staten Island, which are geographically isolated, and present transportation-related problems, the statistics indicate that for the period 1972-76 there has been no pattern, practice or procedure identifying these schools by relation to ethnic staff statistics as intended for students of a particular race, color or national origin. The numbers of minority teachers there have not fluctuated despite the fact that each has become increasingly minority in student population. For example, Benjamin Cardozo High School had 4 minority teachers in 1972 and has 4 today. Francis Lewis High School had 3 minority teachers in 1972 and 3 today. Forest Hills High School had one (1) minority teacher in 1972 and one (1) today. Long Island City High School had 2 minority teachers in 1972 and 2 today.

16. In each of these schools the percentage of non-minority children has declined during the period 1972-76, e.g., Cardoza 75% to 54.6%, Francis Lewis H.S. 69% to 60.2%, Forest Hills H.S. 79.5% to 57.5%, Long Island City H.S. 71.4% to 70.4%, Bayside H.S. 76.7% to 64.9%, Abraham Lincoln H.S. 73% to 66.6%, James Madison H.S. 69.8% to 66.6%, Midwood H.S. 69.1% to 64.4%, Lafayette H.S. 76.1% to 68.2% and William Grady H.S. 88.4% to 76.6%. The minority student population increased in these schools while the student population for most of these schools experienced significant reduction, occasioning excessing and other dislocations. Thus, the teacher ethnicity pattern is primarily random resulting from many variables that are involved in school staffing. It cannot be maintained that in the face of this complexity that distribution in the high schools is the product of a policy or practice of discrimination. This office has monitored appointments carefully and attempted in every instance to employ an educationally oriented and non-discriminatory policy in making assignments to the high schools.

/s/ RUFUS THOMAS
RUFUS THOMAS

Sworn to before me this
4th day of January, 1978.

FELIX V. BAXTER
Felix V. Baxter
Notary Public
Qualified in the County of Kings
Commission Expires June, 1979
24-4646864

Letter to Irving Anker Dated 3/22/78

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
Washington, D.C. 20202

Chancellor Irving Anker
Board of Education of the
City of New York
110 Livingston Street
Brooklyn, New York 11201

Dear Chancellor Anker:

We have reconsidered the matter of your district's eligibility for Emergency School Aid Act (ESAA) funding for school year 1977-78, as required by the United States District Court for the Eastern District of New York. *Board of Education of the City School District of the City of New York, et al.* v. *Califano, et al.*, No. 77-C-1928 (November 18, 1977).

In our letter of December 9, 1977, we told you that an informal meeting would be arranged to give your district a new opportunity to show cause why our determination that your district is ineligible on the ground of discrimination in the assignment of teachers on the basis of race, color, or national origin pursuant to 20 U.S.C. §1605(d)(1)(B) and the HEW regulation 45 C.F.R. 185.43(b)(2) should be revoked. The informal meeting was held on January 5, 1978. Affidavits and other documents were submitted to us, and school district officials discussed your eligibility with us. Additional materials were received from your district by mail. After carefully considering each

point made by your representatives, we regrettably conclude that the City School District of the City of New York remains ineligible for assistance under the Emergency School Aid Act for school year 1977-1978.

The Emergency School Aid Act authorizes Federal financial assistance to meet special needs incident to the elimination of minority group segregation and to encourage the voluntary elimination, reduction or prevention of minority group isolation in elementary and secondary schools. To be eligible for ESAA assistance, an applicant must be implementing (or prepared to implement) a qualifying plan for desegregation or the reduction, prevention or elimination of racial isolation, or a plan to establish or maintain one or more integrated schools. Each application is reviewed for plan eligibility and a determination is made as to whether the applicant meets the civil rights related limitations on eligibility as contained in 45 C.F.R. section 185.43 of the ESAA regulations. These limitations, among other things, preclude school districts from having in effect any practice, policy, or procedure which results in discrimination in the recruiting, hiring, promotion, payment, demotion, dismissal or assignment of personnel, including the assignment of full-time classroom teachers in such a manner as to identify any school as intended for students of a particular race, color, or national origin (section 185.43(b)(2)).

As you know, by letter dated November 9, 1976, the Office for Civil Rights advised the New York City Board of Education (Board) of its violation of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, on the basis of race and national origin. The letter of findings was issued after

the completion of an investigation relating to the employment practices of the school system. Specifically, it was found that the system denied minority teachers full access to employment opportunity through the use of selection and testing procedures that have not been validated in accordance with legal requirements and that resulted in the disproportionately low hiring of minority candidates. It also found that teachers, assistant principals, and principals were assigned in a manner that had created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools.

With regard to the assignment of teachers, principals and assistant principals, the OCR letter of November 9, 1976, therefore, specifically found the Board in noncompliance with Title VI. I made an identical finding in my letter of ineligibility for ESAA dated July 1, 1977. The assignment data in these letters were not refuted by the district either in our first show cause meeting of July 22, 1977, or our second such meeting of January 5, 1978. Rather, school district representatives said that the teacher assignment and distribution in the New York City public schools is basically due to:

1. State education law
2. Collective bargaining agreements
3. Demographic changes in student assignment
4. Incidence and distribution of vacancies in specific teacher license areas
5. Teacher turnover (attrition) rate of schools in favorable neighborhoods vis-a-vis schools in undesirable areas

Representatives of your school district argued that these five conditions precluded a less segregated teacher distribution prior to our letter of September 1977 in which we previously determined that you are ineligible to participate in the ESAA program. However those arguments are addressed in part by section 703(a), 42 U.S.C. 1602, of the Emergency School Aid Act (P.L. 92-318 enacted June 23, 1972) which states that:

> It is the policy of the United States that Guidelines and criteria established pursuant to this title shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

Eighteen of the 32 Community School Districts in New York City independently applied for ESAA funding. All districts were granted waivers to participate in the ESAA program with the exception of CSDs 10, 11, and 15. Each of these three districts was in violation of 45 CFR 185.43 (b)(2) by reason of their teacher assignment to schools. Of the re[illegible]ing 15 districts, seven (7) were notified of their ineligibility for funding due to teacher assignments. These districts were CSDs 3, 6, 13, 18, 19, 24, and 32. Waivers were subsequently granted these districts after voluntary teacher reassignments were made and each CSD advised H.E.W. of the reassignment.

However, your district filed suit in the Eastern District of New York on September 27, 1977, and obtained the order of November 18, 1977, which we have followed in giving

a new consideration to each of the factors which you allege show that you have not discriminated. In doing so, we have addressed the following concern of the Court:

> This court's power of review is limited. 5 U.S.C. §706. Had H.E.W. adhered to constitutionally mandated procedure and to statutory standards its decision, whether favorable or unfavorable to the City, would have had to be affirmed. The record before this court suggests that the agency failed to consider the evidence offered by plaintiffs because it mistakenly believed it to be irrelevant. The matter must, therefore, be remanded for further consideration by H.E.W.

Board of Education v. Califano, slip op., p. 2.

We have considered all of the evidence your district has presented with the court's statement in mind. In particular, as we advised you in our letter of December 9, 1977, we have focused on the following standard established by Judge Weinstein:

> Before declaring a school board ineligible for ESAA funds, H.E.W. must find either that (1) the school board was maintaining an illegally segregated school system on June 23, 1972 and it took no effective steps to desegregate after that date or (2) it had a practice after June 23, 1972 that was segregative in intent, design or foreseeable effect. It may rely on statistics alone to make this finding, but it may not ignore evidence tending to rebut the inferences drawn from the statistics.
>
> "A school board is entitled to an informal hearing to challenge a finding of ineligibility under ESAA. At a minimum an informal hearing requires the parties to be made aware (1) of the substantive standards that will apply, (2) that evidence submitted relevant to these standards will be considered, and (3) the reason for an adverse decision. *Board of Education v. Califano,* slip op. pp. 51-52.

We hereby determine, as required by the court, that on and before June 23, 1972, the City School District of the City of New York discriminated on a racial basis in the assignment of teachers and maintained an illegally segregated system in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and the requirements of the ESAA. We also determine that after June 23, 1972, the district took no effective steps to desegregate the system, which it had illegally segregated and maintained a system of illegal treatment of teachers through discriminatory practices and assignments which were segregative in intent, design, or foreseeable effect. The district has been given an opportunity to rebut the statistical *prima facie* case of discrimination, but its explanations are not persuasive. See *ibid,* slip op. pp. 52-53.

We have also kept before us the following principle from Judge Weinstein's opinion:

> Nothing in the Constitution or ESAA's statute, legislative history, or administrative regulation justifies granting funds on the ground that a discriminatory practice has been beyond the local school authority's ability to control. This purported defense of the Central Board, though poignant in its demonstration of

> lack of personal blameworthiness, may be unconvincing to H.E.W. The fact that the discriminatory patterns which resulted in correlation of teacher and student assignment by race may have been exacerbated by state statutes and policies is only relevant if those factors can be shown to be racially neutral. The Central Board is chargeable with discrimination caused by state statutes. H.E.W. could find that the statistical disparities are so grossly disproportionate to what would be expected in a racially neutral system that they represented a practice of discrimination based upon color or national origin in the assignment of teachers. *Ibid,* slip op., pp. 54-55.

It is our finding that the assignments of minority, particularly black and Hispanic teachers, as well as other teachers in your school district are such that they could have come about only through foreseeable acts of discrimination. The data demonstrating that minority teachers were concentrated in schools at all levels with a predominance of minority students was extensively set out in the November 9, 1976, letter from OCR, in our ESAA denial letter of July 1, 1977, and in the evidence presented to Judge Weinstein in *Board of Education v. Califano.* Equally important is the fact that schools which at all levels were predominantly non-minority in student population, often are staffed by few and sometimes no minority teachers.

In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18 (1971), the Supreme Court stated that:

> Independent of student assignment, where it is possible to identify a "White school" or a "Negro school"

> simply by reference to the racial composition of teachers and staff. . . . A *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

Judge Weinstein summarized the data as follows:

> The statistical data does lend support to H.E.W.'s finding that subsequent to 1972 there was a pattern of assigning teachers by the Central Board in a way that would tend to correlate the race of the teacher with the predominant race of the students in the school. There is a direct correlation between the numbers of minority teachers and the percentage of minority students in the City's schools when the schools are broken down into groups of low, medium and high minority school population.
>
> Information on the high schools is particularly damaging to the Central Board's case since it, and not the Local Boards, controls high schools. *Ibid,* slip op. p. 16.

The racial assignment of faculty in your district is strikingly illustrated by the absence of minority teachers at certain high schools serving predominantly non-minority student bodies. The placement of teachers at the high schools is strictly under the control of the Central Board. Even if we were to concede that racial concentrations may sometimes be acceptable in small, special purpose schools, the following were not adequately explained at the January meeting or otherwise.

School	*% Minority Students*	*% Minority Teachers*
New Utrecht	22.5	0.0
Lafayette	29.2	0.6
James Madison	35.6	0.9
Abraham Lincoln	37.0	0.7
Forest Hills	38.8	0.8
William E. Grady	22.2	0.0
Franklin D. Roosevelt	29.4	1.8
Bayside	30.4	1.3
Francis Lewis	36.9	1.7
Southshore	36.9	2.4

To date, despite our requests we have not been given an adequate explanation of the absence of minority teachers at these schools.

Neither was a response provided giving the effective steps the district has taken to desegregate the faculties of its schools. No evidence has been submitted to show the patterns of racial assignment of teachers have changed in the current year substantially from that in 1975-76 or previously. A request by the HEW counsel present at the January 5, 1978, meeting for data showing the racial patterns of teacher assignment in 1969 and earlier for comparison was not met by the district. Nor was current data provided to demonstrate whether these patterns have been corrected.

We have not been provided with legally sufficient explanations to rebut our finding that teacher assignment has been discriminatory in violation of ESAA. We have noted previously that the alternative hiring methods under the State decentralization law have tended to concentrate minority

teachers in schools with predominantly minority student populations. The Anker affidavit submitted at the January 1978 meeting indicates that this result was specifically intended, at least in the so-called "lower 45%" schools as measured by the reading ability of their students. Other evidence indicates the 45% schools were known at the time of the decentralization legislation to be predominantly minority schools. (See Anker affidavit of January 4, 1978, p. 8.)

Your affidavit, in citing the legislative history of the decentralization law, identifies and supports the increase in *representation* of minority teachers in your district. In fact, we believe while this may be the posture of the district, the statistical evidence conclusively demonstrates that the statements made by your representatives fully support the conclusions of the OCR letter of findings concerning the discriminatory assignment patterns which result from the dual hiring methods in your district. The OCR letter of November 9, 1976, said:

> Information provided by the school system shows that the percentage of minority teachers hired on the basis of the National Teachers Examination (one option of the alternative method) is at least four times the percentage of minority teachers on the rank order list. . . . *Thus, our investigation reveals that the rank order process dramatically excludes a large number of qualified minority teachers from employment opportunities in a majority of the district's schools, i.e., the high schools, special schools, and the non-45th percentile schools.*
>
> The racially identifiable group of teachers who are selected as a result of the alternative method are

> restricted to 45th percentile schools, which are themselves racially identifiable. The student racial composition of the 45th percentile schools has exceeded 91 percent minority since the alternative hiring method was implemented for the 1971-72 school year. . . . *As a result, many minority teachers are not only excluded from full employment opportunity in the non-45th percentile schools but are also channeled to schools in a manner that directly corresponds to the student racial composition of the schools.* (Emphasis added.)

The fact that the assignments that foreseeably concentrated minority teachers at minority schools arose from state law does not excuse those practices. That is the basic meaning of *Brown v. Board of Education,* 347 U.S. 483 (1954). Accord, *United States v. Indianola Municipal Separate School District,* 410 F.2d 626, 632 (5th Cir. 1969), *cert. denied,* 396 U.S. 1011 (1969); *United States v. Board of Education of Bessemer,* 396 F.2d 44 (5th Cir. 1968). Whether a result of State law, ordinance, or simple custom, a finding of intentional, constitutionally proscribed, student or faculty segregation may be grounded upon a finding of:

> . . . actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation. *Hart v. Community School Board of Education, N. Y. School District #21,* 512 F 2d 37, 50 (2nd Cir. 1975).

In this instance, both Board policy and State law had the natural and foreseeable consequence of producing faculty segregation.

District representatives have also argued that teacher transfers, such as would be necessary to correct the present racial concentrations are restricted by union contract. However, collective bargaining agreements or other volitional arrangements entered into by the school authorities may not excuse constitutionally forbidden segregation. *Hobson v. Hanson,* 269 F. Supp. 401, 502 (D.D.C. 1967), aff'd *sub nom Smuck v. Hobson,* 408 F.2d 175 (D.C. Cir. 1969). Nor may teachers as agents of school authorities, legally choose to segregate themselves. *Kelly v. Guinn,* 456 F.2d 99, 197 fn. 8 (9th Cir. 1972); *Reed v. Rhodes,* 422 F. Supp. 708, 787 (N.D. Ohio 1976). For the same reason, the related argument that teacher vacancies in the so-called "desirable" high schools (almost entirely non-minority) must await "attrition" is legally inadequate. Further, while we have considered your argument concerning vacancies in teacher license areas, that consideration cannot explain the degree of racial segregation present here.

It is well established that benevolence of motive does not excuse segregative acts. *United States v. School District of Omaha,* 521 F.2d 530, 535 (8th Cir. 1975); *Hart v. Community School Board of Education, supra,* 512 F.2d at 50. This principle alone rebuts the school district's reference to "role models" as an excuse for concentrating minority teachers with minority students. See Anker affidavit, p. 9. This argument was specifically rejected as a defense to segregation in *Omaha, supra,* 521 F. 2d at 538, fn. 14. Accord, *Arthur v. Nyquist,* 415 F. Supp. 904 (W.D.N.Y. 1976).

Finally, we have concluded that two additional arguments offered by your district are refutable. We understand that the presence of some Hispanic teachers at schools with

large numbers of Hispanic students may be related to the bilingual program. However, no evidence was provided to show that all or most of the Hispanic teachers assigned in the district have been placed in accordance with the so-called ASPIRA decree or any other recognized program, and such an explanation cannot account for the degree of racial, as well as ethnic, separation present here. (In fact, a majority of the qualified bilingual teachers are *not* Hispanic.) Nor has evidence demonstrated that student demographic changes have had any substantial effect on the character of faculties at schools in the district.

In conclusion, I regret that I must inform you that, upon reconsideration, I find that your district remains ineligible for ESAA for the school year 1977-78, even under the standards enunciated by Judge Weinstein's opinion of November 18, 1977.

Sincerely yours,

HERMAN R. GOLDBERG
Herman R. Goldberg
Associate Commissioner
Equal Education Opportunity
Program

Affidavit of Charles Schonhaut Dated 4/78

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77 C 1928

(JBW)

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICTS OF THE CITY OF NEW YORK, *et al.*,

Plaintiffs,

—against—

JOSEPH CALIFANO, *et al.*,

Defendants.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF KINGS, *ss.:*

CHARLES SCHONHAUT, being duly sworn, deposes and says:

1. I am the Senior Assistant to the Chancellor of the City School District of the City of New York and having knowledge of the facts as stated hereafter submit this affidavit in support of plaintiff Board of Education's (hereafter "Board") application for a preliminary injunction and judgment.

2. As the Senior Assistant to the Chancellor, I have, for three years, been responsible for implementing accountability designs in the various departments of the

Board, monitoring program effectiveness in the Office of Educational Evaluation, assisting the Chancellor in establishing minimum educational standards, and system-wide, promotion, grade organization and evaluation policies and in general assisting the Chancellor in the various *ad hoc* assignments which arise in the day to day operation of the school system. Most recently, I have been designated principal negotiator of matters raised in the November 9, 1976 and January 18, 1977 (revised on October 4, 1977) findings of the Office for Civil Rights, H.E.W., which charged the City School District with various violations of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of Rehabilitation Act of 1973. Prior to becoming the Senior Assistant to the Chancellor, I was Community Superintendent of Community School District #17 in Brooklyn for four years, Principal of P.S. 120-K for three years and Assistant Principal of J.H.S. 263-K for ten years.

3. By letter dated July 1, 1977, the Chancellor was notified that the Board's 1977-78 application for funds under the Emergency School Aid Act (ESAA) was denied on several grounds.

4. In the interim, through negotiation and further data collection, HEW has either settled, revoked or decided not to advance all other grounds for ESAA ineligibility alleged in that letter and solely asserted violation of 45 C.F.R. 185.43(b)(2) in teacher assignment as the basis for ineligibility, that is, that ethnic teacher staff statistics evidence a pattern of assignment from which it is "possible to identify schools as intended for students of a particular race, color or national origin."

5. On or about September 27, 1977 the Board commenced this action seeking an injunction against implementation of the Goldberg decision of July 1, 1977.

6. By a memorandum and order dated November 18, 1977, this Court granted a preliminary injunction and ordered H.E.W. to conduct a proceeding to determine *de novo* the Board of Education's eligibility for ESAA funding.

7. By letter dated December 9, 1977 the Chancellor was informed by HEW that an "informal meeting" would be held to provide the City School District with an opportunity to explain why HEW's determination of the New York City School District's ineligibility on the ground of discrimination in the assignment of teachers on the basis of race, color or national origin is erroneous and should be revoked.

8. The Show Cause Hearing, which I personally attended and testified at, was held on January 5, 1978 in the offices of Herman R. Goldberg, Associate Commissioner, Equal Educational Opportunity Programs, Department of Health, Education and Welfare. A transcription of the proceeding was made (Exhibit "1").* Additionally, Marie DeCanio, Deputy Executive Director, Division of Personnel testified to procedures and practices of the Division of Personnel, Office of Pedagogical Appointments in the assignment of teachers, the nature and incidence of teacher vacancies throughout the City School District, the relevant collective bargaining procedures and state law and contractual agreements affecting the distribution of teachers in the City

* Transcript references shall be noted by "T" and page(s).

School District. The record was also supplemented by the Thomas and Anker affidavits (Exhibits "2" and "3") and the post-hearing submissions requested by H.E.W. (Exhibits "4" and "5").

9. At the hearing, I explained how the operation and interaction of a multiplicity of complex factors beyond the control of New York City School District accounted for the racial/ethnic distribution of teachers throughout the school system. Among the numerous racially neutral factors affecting the racial/ethnic distribution of teaching staff in the New York City School District which I orally explained to Dr. Goldberg or directed his attention to in written submissions were the following: demographic changes in the student population of the City schools, state law, collective bargaining agreements' neutral date of hire, seniority practices, special programs for non-English speaking students, minority evidence in the relevant available work force, and incidence and distribution of vacancies in specific teacher license areas.

10. *Demographic Changes in Student Population.* During the hearing I explained that New York City schools have been and continue to be affected by general demographic trends which have dramatically altered the racial/ethnic composition of the student population (p. 13). These demographic changes, which weer more elaborately examined in the supporting Affidavit of Irving Anker submitted at the Hearing (Anker Affidavit, pp. 2-3), are beyond the control of the Board of Education of the City of New York.

11. Despite the Board of Education's blameless inability to influence or curtail general population trends, it has

voluntarily adopted policies and practices designed to mitigate the impact of these trends on the New York City schools and improve the racial/ethnic student balance where opportunities for amelioration exist (p. 13; Anker Affidavit, pp. 4-6). These activities have consisted of, among other things, zoning for racial balance, open enrollment and stabilization plans (p. 13, Anker Affidavit, pp. 4-6).

12. In order for the racial/ethnic distribution of the teaching staff to mirror the racial/ethnic distribution of the student population, the Board would be forced to make massive and continuous shifts of its teaching staff at rates comparable to these demographic changes. Such drastic measures would not only detrimentally affect the continuity and educational effectiveness of programs in the school system but would abrogate existing rights of teaching personnel and violate state law.

13. Demographic trends in the population have resulted in a similar phenomenon occurring at the high school level. (p. 19, Anker Affidavit)

14. A particularly telling example of the impact of demographic trends in New York City High Schools arose at the Hearing in connection with a discussion of William Grady High School. (p. 34). That school's population has increased from about 1900 pupils in 1972 to 2124 in 1976. The non-minority student population has decreased over that same period from 1708 to 1627, while the Black student population has gone from 125 to 306. H.E.W.'s position that the racial/ethnic distribution of teaching staff must be congruent with the racial/ethnic composition of the student body, no matter how fluctuating, would necessitate a drama-

tic number of teacher transfers. Aside from the educational dislocations incidental to such movement of teachers, it abrogates the bona-fide color-blind seniority-based transfer rights of teachers, as well as the crucial factors of system wide attrition rates and individual vacancies and staffing problems of particular schools which are practical realities of operating a school system.

15. *State Law.* The 1969 amendments to the State Education Law restructured the New York City School System into 32 decentralized Community School Districts. (Article 52-A, Educ. L. §2590-E(2)). Section 2590-j of the amendments established an alternate teacher selection mechanism which permitted the appointment and assignment of teachers regardless of candidate ranking on eligible lists to schools where the reading level is below the 45 percentile of reading scores for the City School District. (Educ. L. §2590-j 5(b)). The Education Law was further amended to permit the appointment of persons who passed the National Teachers Examination (NTE) to teaching positions in 45 percentile schools. (Educ. L. §2590-J 5(C) and (C) (1). The Chancellor's affidavit, submitted at the Hearing, denominated the sundry purposes sought to be achieved by the amendments (Anker Affidavit pp. 7-9). At the Hearing I discussed perhaps the most important basis for the enactment of these amendments, that of facilitating permanent teacher appointments in difficult-to-staff schools. (pp. 14-18) Traditionally, because of crime, transportation problems, high student truancy, etc. these schools had to rely largely on substitute teachers to fill the teacher rosters, with attendant educational disadvantage. The amendments enlarged the pool of eligible teachers thereby enhancing the

opportunities for the selection and *permanent* appointment of teaching staff to schools. While it is true that the amendments were also designed to increase the pool of minority teachers, that pool was still *predominantly non-minority.* Thus, it was expected that these schools would achieve educationally desirable teacher staff stability and receive additionally some increased percentage of minority teachers. It was emphasized that the mandatory rank-order option had failed to produce that number of minority teachers comparable to the dramatic increase in the percentage of minority students or the minority population of New York City School District. Thus a policy designed to maintain established rank order candidate rights but at the same time create avenues for increased minority access into the teaching staff was necessary. These competing considerations evolved within the context of an, at that time, experimental decentralized school system. In such an interplay H.E.W.'s notion of "foreseeability" is largely hindsight.

16. *Consent Decree Program.* The consent decree in *Aspira of New York v. Board of Education, et al.,* 72 Civ. 4002, requires the New York City School System to implement a program of bilingual instruction for Spanish-Language dominant children. At the hearing, I explained to Dr. Goldberg that this program and other bilingual programs have resulted in some concentration of minority teachers, especially Hispanic, in schools where such programs are administered (p. 18; Anker Affidavit p. 10). In addition, an agreement signed on September 15, 1977, with the Office For Civil Rights of the Department of Health, Education and Welfare incorporates the basic concepts and

elements of the Consent Decree program but broadens the applicability of such services to non-Hispanic, non-English speaking students.

17. My explanations and observations on the racial/ethnic impact of these programs have been misconstrued by Dr. Goldberg in his determination of March 22, 1978. In his determination Dr. Goldberg states that "no evidence was provided to show that all or most of the Hispanic teachers assigned in the district have been placed in accordance with the so-called Aspira decree or any other recognized program, and such an explanation cannot account for the decree of racial, as well as ethnic seperation present here. (In fact, a majority of the qualified bilingual teachers are not Hispanic.)"

18. The testimony I gave at the Hearing and the supporting affidavits submitted at that time were not intended to show that all or even a majority of teachers in bilingual programs are Hispanic. Rather, a large percentage of the relatively small number of Hispanic Teachers are concentrated in bilingual programs either mandated by Aspira or provided under Title VII or ESL programs.

19. These explanations of Hispanic teachers concentration are consonant with the agreement of November 9, 1977 between the Board of Education and the Office For Civil Rights which provided for educationally-based program exceptions to the general requirements for teacher distribution. In fact, a letter writtten by David S. Tatel, Director of the Office For Civil Rights, dated December 30, 1977 to Robert Hermann, Puerto Rican Legal Defense and Education Fund, Inc. specifically states: "We believe that

effectuation of the *Aspira* decree would constitute an "educationally based program" exception. Indeed, as you are aware, OCR itself contemporaneously with the Memorandum of Understanding entered into a *Lau* agreement with the Board that builds upon the *Aspira* program."

20. At the hearing Dr. Goldberg did not challenge these educationally based program exceptions nor did he or his staff request additional data to demonstrate the degree of Hispanic teacher involvement in the Consent Decree programs.

21. *Contract Provisions.* Neutral date-of-hire collective bargaining agreement provisions govern the rights of teachers to transfer to existing vacancies within the school system and also determine teacher rights in instances where school(s) are forced to excess teaching personnel. (pp. 33, 35-36; Anker Affidavit p. 10; Supplemental Submission to Dr. Goldberg dated January 13, 1978). Despite the oral testimony and written evidence explaining these bona fide non-discriminatory seniority based transfer and excessing rights, which admittedly hamper the Board's integration efforts but are not discriminatory *per se,* Dr. Goldberg has determined that ". . . collective bargaining agreements or other volitional arrangements entered into by the school authorities may not excuse constitutionally forbidden segregation."

22. During the Hearing the New York City School District representatives were questioned regarding the lack of or low representation of minority teaching staff at various high schools, i.e., New Utrecht, Lafayette, James

Madison, Abraham Lincoln, Forest Hills, William E. Grady, James Adams, Francis Lewis, etc. (pp. 26-41).

23. The level of minority representation among the teaching staff at these schools is a function of several independent non-discriminatory factors such as attrition rates, vacancies, staff stability, transfer and excessing contractual rights, desirability of geographical locations, and availability of qualified minority teachers in specific license areas. (pp. 26-39; Anker affidavit pp. 18-19). Hard data to support this contention was submitted. (See Thomas affidavit).

24. Despite this evidence, the Carroll letter of January 12, 1978 and the Baxter letter of January 19, 1978, documenting the cumulative impact of these factors on the staffing of these high schools, Dr. Goldberg found them to be "unpersuasive." However, the plain facts which cannot be refuted is that Boys and Girls High School has 40 times the attrition rate of New Utrecht. In response Dr. Goldberg is nonetheless not persuaded. I can only infer that he does not dispute the fact as we allege them but rather is unpersuaded that forced transfer or some other unspecified defice, could not have been adopted. However, established teacher seniority rights prevented the Board from effecting the ethnic distribution of teachers in these schools which Dr. Goldberg seeks.

25. Moreover, in areas where it had flexibility and control the Board's affirmative steps improved the racial/ethnic balance of teachers throughout the system, for example, by a more stringent declination policy, limitation on hardship transfers and direct placements pursuant to the agreement

between the Board of Education and the Department of Health, Education and Welfare dated September 9, 1977. (pp. 44, 56; Thomas affidavit p. 4).

26. The Board's submissions at the Hearings also explained again the inappropriateness of H.E.W.'s previous findings with respect to our alternative high schools, i.e., Harlem, Park East, Harlem Prep, Lower East Side Prep, Satellite Academy, Pacific, Redirection and Auxiliary Services. (Anker affidavit p. 13-14). However, there was no specific findings with respect to these schools in H.E.W.'s post-hearing decision and we, thus, conclude that the District Court's analysis of the staffing there as consonant with ESAA has been accepted by H.E.W.

27. By letter dated March 22, 1978, Dr. Goldberg informed the Chancellor that he had concluded that the "City School District of the City of New York remains eligible for assistance under the Emergency School Aid Act for school year 1977-78," because:

> . . . On and before June 22, 1972, the City School District of the City of New York discriminated on a racial basis in the assignment of teachers and maintained an illegally segregated system in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and the requirements of the ESAA. We also determine that after June 23, 1972, the district took no effective steps to desegrate the system, which it had illegally segregated and maintained a system of illegal treatment of teachers through discriminatory practices and assignments, which were segregative in intent, design or foreseeable effect."

Affidavit of Charles Schonhaut Dated 4/78

28. The record of the hearing, the supporting affidavits and other documents refute the determination of Dr. Goldberg that the New York City School System has maintained an illegally segregated system in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964 or the requirements of the ESAA.

29. Quite the contrary, the record of the hearing conclusively proves that the racial/ethnic distribution of the New York City teaching staff has resulted from a complex matrix of non-discriminatory factors beyond the immediate control of the New York City Board of Education.

30. Of equal importance, the record demonstrates the commitment of the Board to solving extremely complicated social and educational problems by undertaking affirmative steps to improve the distribution of teachers of all races and ethnic backgrounds where legal opportunities to do so existed.

CHARLES SCHONHAUT
Charles Schonhaut

Sworn to before me
this ..... Day
of April, 1978

Transcript of Proceedings Before Weinstein, J.
Dated 4/12/78

Ms. Carroll: Assuming I will have something.

The Court: I struck out, as you may have noticed, the temporary restraining order in your papers.

Ms. Carroll: No, I didn't.

The Court: I did, and made it returnable today.

What I'm going to say applies to the Board of Education, and not to District 11.

I've carefully read all of the record that you submitted. Based on that reading of the record, it's my conclusion that the Board has had a fair hearing in accordance with my order. H.E.W. has determined that the school system is illegally segregated within the terms of the applicable Federal statutes. There are substantial grounds to support that finding. Under the circumstances, there's almost no possibility of the plaintiff's winning this suit. And injunction will have to be denied. Upon motion of the Government, the complaint will be dismissed.

Ms. Carroll: Can we have a stay of that order pending appeal?

The Court: You don't have an order. As soon as it's submitted.

Ms. Carroll: Fine.

The Court: Do you want to make a formal motion for summary judgment?

Mr. Caro: Yes, your Honor.

The Court: Make it.

Mr. Caro: We would like to move for summary judgment dismissing the complaint.

Transcript of Proceedings Before Weinstein, J.
Dated 4/12/78

The Court: Do you have anything else to offer but what you've offered?

Ms. Carroll: No, your Honor.

The Court: Motion granted. Submit an order. I'll give you a stay until next Tuesday at five o'clock so that you can go up to the Court of Appeals. That's the end.

Ms. Carroll: Thank you.

Mr. Caro: Thank you very much.

(Whereupon this matter was concluded.)

Amended Verified Complaint Dated 4/6/78

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77 Civ. 1928

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, IRVING ANKER, Chancellor of the City School District of the City of New York; COMMUNITY SCHOOL DISTRICTS 1, 7, 9, 11, 12, 13, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29 and 30, 32,

Plaintiffs,

—against—

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, HERMAN R. GOLDBERG, Associate Commissioner, Equal Educational Opportunity Programs, United States Department of Health, Education and Welfare; DAVID S. TATEL, Office for Civil Rights, United States Department of Health, Education and Welfare,

Defendants.

AMENDED VERIFIED COMPLAINT

NATURE OF THE ACTION

1. This action seeks a declaration that the denial by the United States Department of Health, Education and Welfare of plaintiffs' applications for funds under the Emergency School Aid Act ("ESAA"), 20 U.S.C. §1601, *et seq.*, violates that Act and is arbitrary, capricious and illegal. Plaintiff seeks a preliminary injunction mandating defen-

dants to preserve and set aside for plaintiffs the sum of $3.5 million from 1977-78 ESAA appropriations, which funds have been initially earmarked for the plaintiffs and obligated and set aside for plaintiff Board of Education of the City School District of the City of New York (hereafter "Board") 1977-78 ESAA application by Memorandum and Order of this Court dated November 18, 1977, which funds would otherwise be disbursed to other school districts, and a permanent injunction against denial of plaintiff Board's 1977-78 ESAA application.

JURISDICTION

2. This court has jurisdiction of this action under:

(a) 28 U.S.C. §1331 in that this action arises under Title VII of the Civil Rights Act, §§701-720, 20 U.S.C. §1601-19, and the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs,

(b) 5 U.S.C. §702 in that this action challenges as arbitrary and capricious administrative action denying plaintiffs' application for funding under ESAA, and

(c) 28 U.S.C. §1361 in that the action seeks to compel the performance by federal officials of a duty mandated by law.

3. Declaratory relief is appropriate pursuant to 28 U.S.C. §2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

VENUE

4. Venue is properly placed in this district pursuant to 28 U.S.C. §1391(e).

PARTIES

5. Plaintiff Board of Education of the City School District of the City of New York ("Board") is authorized pursuant to New York Education Law to operate the public school system in the New York City School District. It is a local educational agency under ESAA eligible to submit applications for funds to finance special educational programs and projects.

6. Plaintiff Irving Anker is the Chancellor and, pursuant to New York Education Law § 2590-h, the Chief Executive Officer of the New York City School District.

7. Community School Boards, 1, 7, 9, 11, 12, 13, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29, 30 and 32 established by Article 52-A (§§2590, et seq. of the New York Education Law), are local educational agencies eligible to submit applications for funding under ESAA.

8. Defendant Joseph Califano is the Secretary of the Department of Health, Education and Welfare ("HEW") and as such is charged with responsibility for supervision and final review of applications for funding under ESAA.

9. Defendant Herman R. Goldberg is the Associate Commissioner, Equal Educational Opportunity Programs, HEW. He is charged with the duty of reviewing applications for ESAA funding and preliminarily determining applicant eligibility.

10. Defendant David S. Tatel is the Director of the Office of Civil Rights, HEW, and is charged with super-

visory responsibility of civil rights compliance investigations and review of applicant requests for waivers of ineligibility.

STATEMENT OF CLAIM

11. In 1972, Congress passed ESAA to provide funds to local education agencies for a variety of programs and projects to eliminate or prevent minority group isolation and to improve the quality of education for all children.

12. On or about January 14, 1977, plaintiff Board submitted an application for ESAA funding to defendant Califano through the Regional Office of the Office of Education, HEW.

13. These applications sought ESAA funds to administer basic, pilot and bilingual programs in the public schools of the City of New York for the 1977-78 school year in Districts 1, 7, 9, 11, 12, 13, 16, 17, 18, 20, 21, 22, 25, 26, 28, 29, 30 and 32 and in the high schools and special educational programs administered by the Board.

14. On April 14, 1977, upon the instruction of HEW staff, the Board submitted a revised application to defendant Califano.

15. The programs contained in the ESAA applications are specifically designed to foster integration and reduce minority student isolation by providing services to 40,000 students in the New York City Schoool District.

16. HEW officials informed plaintiffs that the educational projects and programs described in the April, 1977

ESAA applications met all HEW programmatic and fiscal requirements and that the applications were approved as to content and amount, subject only to a determination that no other legal impediment to funding existed.

17. By this action, ESAA funds of approximately $17.5 million were tentatively approved and set aside by defendants for the programs and projects of plaintiffs.

18. On or about July 1, 1977, defendant Goldberg advised plaintiffs (by letter) that ESAA funding would be denied to the New York City School District for the 1977-78 school term.

19. The denials were based upon conclusions arrived at by the Office for Civil Rights ("OCR") after an investigation of civil rights compliance in the New York City School District under Title VI of the Civil Rights Act of 1964.

20. That investigation resulted in a report dated November 9, 1976, specifying areas of alleged noncompliance with the provisions of Title VI of the Civil Rights Act of 1964.

21. In a report dated April 22, 1977, the Board denied the existence of any discriminatory practice and submitted data rebutting the conclusions of OCR.

22. Although HEW's letters sent to plaintiffs on or about July 1, 1977 cited other grounds for denial of plaintiffs' ESAA applications, upon subsequent consideration HEW advised plaintiffs that ESAA funds would be denied

to plaintiffs solely on the ground of alleged discrimination in assignment of teachers in the public schools .

23. The purported basis for the finding was OCR statistics allegedly reflecting 1) low system-wide minority teacher hire rate in the New York City School District and 2) a higher incidence of minority teachers in some schools with high minority student populations and a higher incidence of non-minority teachers in some schools with higher non-minority student populations.

24. The notices of denial advised plaintiffs that they were permitted to seek an opportunity to show cause before defendant Goldberg why the determinations of ineligibility should be revoked pursuant to 45 CFR §185.46.

25. Plaintiffs' timely requests for an opportunity to show cause were granted by defendant Goldberg. The show cause proceedings were held over a period of three weeks in July 1977.

26. Both in its ESAA application and at the Show Cause proceeding, plaintiffs established that it has had and continues to have a policy of non-discrimination and that schools were and are not identified as intended for students of a particular race, color or national origin.

27. That administrative record demonstrated that current minority and non-minority student and teacher population patterns primarily resulted from and were affected by State law; demographic changes in the student population of the City schools; collective bargaining agreements' neutral, date-of-hire seniority practices; minority incidence

in the relevant available work force; incidence and distribution of vacancies in specific teacher license areas. These factors are described more fully below:

A. *State Law—*

All teacher appointments and assignments in New York City public schools until 1970 were made pursuant to the provisions of Education Law §2569 and §2573. Under that statutory scheme, upon the Chancellor's request (Educ. L. §2573 (2)), the Board of Examiners conducted competitive examinations for pedagogical licenses and promulgated lists of candidates ranked in order of performance on the examinations (Educ. L. 2569), which eligible lists were then certified to the plaintiffs for appointment and assignment of teachers in rank order (Educ. L. §2573 (10-a)).

The Education Law also permitted assignment of persons with substitute license where there are an insufficient number of regularly licensed teachers to fill vacancies. Eligible lists have at no time described or identified the national origin or race of candidates for pedagogical assignment.

B. *Amendments to Education Law*

While the above statutory pattern continues to be applicable in a variety of situations, a new method for teacher appointment and assignment for a substantial number of schools within the New York City school district was created by the 1969 amendments to the Education Law designed, in part, to achieve affirmative action goals in teacher hiring. Effective September 1969, the New York City School System was restructured into 32 decentralized

Community School Districts which, subject to the powers retained by the Central Board and the Chancellor, were authorized to appoint and assign teachers. Educ. L. §2590-e (2).

As part of this new decentralization law Education Law §2590-j(5) provided the following three alternative methods of teacher appointment and assignment in schools within community school districts where the reading level is below the 45 percentile of reading scores for the City School District. Such appointments in such schools may now be made from (1) eligible lists regardless of candidate ranking, (2) the National Teachers Examination, a qualifying (i.e., non-ranked), rather than a competitive examination administered nationally by the Education Testing Service, or (3) lists resulting from qualifying examinations prepared and administered by the Board of Examiners. These amendments to the Education Law were enacted to (1) equalize reading achievement levels, (2) increase the number of minority teachers employed in the New York public School system; (3) eliminate overutilization of substitute licensed teachers, and (4) maximize community control-based solutions to educational problems.

Revisions of the New York Education Law were based on these factors: (a) City public school student population had dramatically changed from predominantly non-minority to predominantly minority (see D below); (b) the percentage of minority teachers (7%—1969), though conconant with the percentage of minority individuals in the relevant available work force (5% of college graduates in the United State and the New York Metropolitan area), was relatively static and disproportionate to the continu-

ally increasing minority student population; (c) low reading achievement, particularly among minority students, fostered a developing educational consensus that minority teacher role-model theories should be explored, at least experimentally, in schools where low reading levels warrant new educational approaches; (d) minority teacher hire rates increased in school districts where NTE and qualifying, rather than competitive examinations for teacher selection, had been utilized experimentally; (e) an overdependence on substitute licenses was developing in various school districts, particularly those with high concentrations of minority students.

C. *Ethnic Hiring Levels Attributable to State Law Amendments*

Teacher hires during the period 1970-71 through 1974-75 reflect that the purpose of the amendments to the Education Law, that of increasing minority teacher hires, was substantially realized. For Blacks the percentage change was + 15.2%, for Hispanics, + 112.6%. The percentage of minority teachers rose from 7% in 1969 to 15% in 1976.

D. *Demographic Changes.*

In 1957, the student population of the New York City School District was 68.3% non-minority; in 1975, 32.1% non-minority. During the same period the non-minority population of New York City decreased by 702,699, while the minority population increased by 815,566.

Housing patterns in virtually all boroughs of the City of New York reflected such large concentrations of minority and non-minority groups that zoning of school feeder patterns to achieve racial balance became increasingly diffi-

cult during the 1960's. To improve racial balance notwithstanding all these factors, the Board devised various zoning strategies, such as choice of admissions, paired schools, and scrutiny of school site selection.

E. *Contractual Provisions and Court Orders*

Teacher assignments reflect date-of-hire seniority under provisions of the collective bargaining agreement between the Board of Education and the United Federation of Teachers which provide that vacancies as they arise, must be offered in the first instance to teachers with the greatest length of service. Also vacancies in specific licenses must, where possible, be filled by persons in license. Thus, the number of minority and non-minority persons possessing licenses and the number of vacancies in a particular license area determine the incidence and distribution of teachers in the school system.

Implementation of the consent decree in *Aspira of New York, Inc. v. Board of Education,* 72 Civ 2004 (S.D.N.Y. August 29, 1974), requiring the provision of bilingual instruction to Spanish-dominant children resulted in the concentration of Hispanic teachers in schools with high Hispanic student populations.

Under a newly developed teacher recall plan for fall 1977, assignments of teachers will be made so as to further racial balance of teaching staffs in all schools, not inconsistent with the consent decree. Recalled teachers are not subject to the contractual provisions referred to above in the first paragraph of paragraph 27E.

28. No evidence was introduced at the show cause proceedings to refute plaintiffs' submission as summarized in

paragraph 27 of this Complaint. In particular, there was no evidence establishing or even suggesting that teacher appoinntments from competitive eligible lists violated the neutral, statutcry rank order scheme. Nor did the OCR Report contain any finding that teacher appointments made from eligible lists violated the statutory scheme for rank order appointments.

29. Moreover, neither teacher appointments or assignments in the New York City School System are made in a manner intended to discriminate against minority children or minority teachers and there has been no judicial finding to the contrary.

30. In *Rubinos v. Board of Examiners,* 74 Civ. 2240 (S.D.N.Y.), a Title VII challenge to methods of teacher selection employed in the New York City public schools, the District Court denied an application for a preliminary injunction enjoining the use of eligible lists derived from teacher license examinations on grounds of racial discrimination.

31. Despite the evidence introduced at the show cause proceeding (¶ 27 of this complaint) and the absence of controverting evidence, defendants have rejected plaintiffs' applications by letters received on or about September 19, 1977.

32. Plaintiffs have exhausted all administrative remedies provided under 20 U.S.C. § 1601-19 and 45 C.F.R. 185.00 *et seq.*

33. Pursuant to 20 U.S.C. §1605d(1)(5), plaintiffs may seek a "waiver of ineligibility" by demonstrating compli-

ance with the remedy in 45 C.F.R. §185.44(d)(3). This is not a mechanism for appealing the final determination of ineligibility. Rather, it is a procedure for securing a waiver of that final determination by showing compliance with the remedy ordered by HEW.

34. Unless the relief requested in this action is granted, plaintiffs will suffer immediate and irreparable injury as a result of defendants' action. Plaintiffs do not have an adequate remedy at law.

35. Defendant Goldberg has advised plaintiff Anker that the ESAA funds set aside for the plaintiffs' application will be held no later than September 30, 1977. Thereafter, the funds will be disbursed to other applicants unless the preliminary relief requested by plaintiffs to preserve the status quo is granted.

36. Plaintiffs have recently been advised that even were the findings of ineligibility reversed after the commencement of the September 1977 school year and before September 30, 1977, the ESAA funds that would otherwise have been available for that period of time (preceding receipt of notice of revocation of ineligibility) would be lost to plaintiffs.

37. Thus, under defendants' interpretation, for every day that goes by without issuance of an award letter for ESAA, plaintiffs lose that day's portion of the ESAA funding.

38. On or about September 7, 1977, plaintiffs and defendants resolved the issue of ethnic staff distribution in the City School System by a Memorandum of Agreement providing for implementation over three years of a program designed to achieve greater racial balance in staffing. The parties have agreed that the Memorandum constitutes compliance with all applicable Title VI standards (See ¶ 19 of this Complaint).

FIRST CAUSE OF ACTION

39. On or about September 23, 1977, plaintiffs commenced an action seeking a preliminary and permanent injunction against HEW's threatened denial of 1977-78 ESAA funding.

40. On that date, a temporary restraining order was issued by the Court preventing defendants from distributing those $3.5 million in ESAA funds preliminarily earmarked for the Board's 1977-78 ESAA application.

41. Following submission of pleadings by the parties and oral argument the Court issued a memorandum decision and order remanding the issue of the Board's and District 11's 1977-78 ESAA applications to HEW for a *de novo* hearing consistent with the due process principles enunciated therein.

42. On January 5, 1978, a hearing was had before defendant Goldberg on the issue of the Board's eligibility for 1977-78 ESAA funding.

43. At that hearing the purported grounds for HEW's denial of ESAA eligibility as charged in Dr. Goldberg's

July 1, 1977 letter to Chancellor Anker were the subject of oral testimony and documentary submissions.

44. At that hearing, the Board proved that the assignment of teachers in the New York City School District resulted from and was affected by neutral, non-discriminatory factors and not any policy practice or procedure which identifies schools as intended for students of a particular race, color or national origin.

45. On March 22, 1978, HEW rendered a decision following the remand hearing and held that the Board was ineligible for 1977-78 ESAA funding.

46. HEW's prior decision following the original show cause proceeding was that the Board violated ESAA and the regulations promulgated thereunder, specifically 45 C.F.R. § 185.43(b)(2) by having in effect, *after* June 23, 1972, a practice policy or procedure which resulted in discrimination on the basis of race, color or national origin in the assignment of teachers to schools in such a manner as to identify such schools as intended for students of a particular race, color or national origin.

47. HEW's decision following the corrective show cause proceeding was as follows:

> "We hereby determine, as required by the Court, that on and before June 23, 1972 the City School District of the City of New York discriminated on a racial basis in the assignment of teachers and maintained an illegally segregated system in violation of the 14th Amendment to the United States Constitution, Title

> VI of the Civil Rights Act of 1964 and the requirements of the ESAA. We also determine that after June 23, 1972 the district took no effective steps to desegregate the system which it had illegally segregated and maintained a system of illegal treatment of teachers through discriminatory practices and assignments which were segregated in intent design or foreseeable effect."

48. At the corrective show cause proceeding the HEW, for the first time, indicated that a purported basis for finding the Board was pre- rather than post-September 23, 1972 practices, policies and procedures which resulted in discrimination on the basis of race, color or national origin, in the assignment of teachers.

49. HEW has no ethnic documentation or data on distribution of teachers in the New York City School District for the period prior to September 23, 1972.

50. By a decision issued on March 15, 1978, in *William Caulfield, et al. v. Board of Education, et al.*, 72-C-2155, this Court permanently enjoined enforcement of the Memorandum of Agreement dated September 7, 1977 (See ¶38 of tihs Complaint) pending a public hearing before HEW on the issues involved therein.

FIRST CAUSE OF ACTION

51. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-38 herein.

52. Defendants applied an erroneous standard and violated 20 U.S.C. §1601-12 and 45 CFR §185.00 *et seq.* in denying plaintiffs' application for ESAA funding.

53. 20 U.S.C. §1605(d)(1)(B) provides that "no educational agency shall be eligible for assistance . . . if it has, after June 23, 1972, . . . engaged in discrimination based upon race, color or national origin in the hiring, promotion, or assignment of employees in the agency . . ."

54. Promulgated under 20 U.S.C. §1605(d)(1)(B) is 45 CFR §185.43(b)(2), upon which defendants assert plaintiffs' ineligibility for funding. That section provides, in pertinent part, that "no educational agency shall be eligible for assistance under the Act, if after June 23, 1972, it has had or maintained in effect any practice, policy or procedure which results in discrimination on the basis of race, color or national origin in the . . . assignment of any of its employees . . . including the assignment of full-time classroom teachers to schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color or national origin."

55. Defendants have construed 45 CFR §185.43(b)(2) to require the denial of ESAA funding merely because of a disparate incidence or distribution of minority teachers, notwithstanding the absence of any proof of discrimination by a grant applicant.

56. This result-oriented construction is erroneous. It is inconsistent with 20 U.S.C. 1605(d)(1)(B) and misconstrues the regulations in that it creates an irrebuttable presumption that disparate ethnic statistics of teacher incidence and distribution, per se, constitute discrimination in teacher assignment violative of ESAA.

57. Disparate impact evidenced by statistical data is not tantamount to discrimination under 20 U.S.C. § 1605(d)(1)(B) or 45 CFR §185.43(b)(2).

58. Under 20 U.S.C. §1605(d)(1)(D) and 45 CFR § 185.43(b)(2) evidence showing that a disparity results frim neutral factors and not from a discriminatory purpose or plan must be considered by HEW in determining whether the assignment and hiring pattern observed bars eligibility for ESAA funding.

59. Defendant Goldberg applied an improper legal standard and violated 20 U.S.C. § 1605(d)(1)(D) and 45 CFR § 185.43(b)(2) in refusing to consider plaintiffs' evidence concerning the non-discriminatory factors which affected and resulted in the present numbers and patterns of teacher assignment.

SECOND CAUSE OF ACTION

60. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-38 and 40-47 herein.

61. There was no proof whatsoever in the administrative record that an intent or purpose to discriminate against minorities was involved in the hiring or assignment of teachers in New York City public schools.

62. Under 20 U.S.C. § 1605 (d) (1) (B) and 45 C.F.R. § 185.43 (b) (2) there must be proof of an intent or purpose to discriminate against minorities in the hiring and assignment of teachers to support a finding of ineligibility for ESAA funding.

63. In the absence of proof of intent or purpose to discriminate, defendants' finding of plaintiffs' ineligibility for ESAA funding violates 20 U.S.C. § 1605 d 1 (B) and 45 C.F.R. § 185.43(b)(2).

THIRD CAUSE OF ACTION

64. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-38, 40-47, 49-51 herein.

65. The evidence submitted to defendants in support of plaintiffs' 1977-78 ESAA application entitled plaintiffs to immediate funding.

66. No practice, policy or procedure of teacher assignment intended to discriminate by identifying schools as intended for students of a particular race, color or national origin was established by the evidence submitted to and reviewed by HEW in connection with plaintiffs' 1977-78 ESAA applications.

67. Defendants have found plaintiffs' applications to satisfy all programmatic and fiscal requirements for ESAA funding.

68. Defendants have no legally sufficient basis for withholding ESAA funds and are required by law to grant those funds to plaintiffs, having found their applications for funding to be otherwise sufficient.

FOURTH CAUSE OF ACTION:

69. Plaintiffs repeat and reallege each and every allegation set forth in paragraph 1-38, 40-47, 49-51, and 53-56.

70. Defendants' action denying plaintiffs' applications for ESAA funding is arbitrary, capricious and illegal and violates 5 U.S.C. §702 in that evidence showed that the ethnic incidence and distribution of teachers in the public schools did not result from a pattern or practice of discrimination.

71. The decision to deny funding based on an insufficient evidentiary basis is illegal and an abuse of discretion.

FIFTH CAUSE OF ACTION:

72. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-50, 51-59, 61-63, 65-67, and 69-70.

73. Defendants' action denying plaintiffs' application for ESAA funding is arbitrary, capricious and illegal and violates 5 U.S.C. 6-02 in that it articulates no rational basis for rejection of plaintiffs' evidence that the distribution of teachers in the City School District resulted from and was affected by neutral non-discriminatory factors.

74. Moreover, summary rejection of that evidence is error of law in that it misconstrues the legal standards for discrimination under the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

(a) Enter a declaratory judgment that the defendants' denial of plaintiffs' 1977-78 applications for ESAA funding (1) is based upon an erroneous standard of law and violates 20 U.S.C. §§ 1601-1619, 45 CFR § 185.43(b)(2) and

5 USC § 702 is that it is arbitrary and capricious, and (2) is unlawful and improper because there is no evidence of a pattern or practice of discrimination in teacher assignment in New York City which bars an award of ESAA funding to plaintiffs nor any rational basis for the rejection of plaintiffs' ESAA application.

(b) Enter a preliminary and permanent injunction mandating that defendants preserve and set aside a fund of $3.5 million for plaintiffs' 1977-78 ESAA application and to award such fund to plaintiffs.

(c) Enter an order awarding plaintiffs their costs and disbursements herein.

(d) Grant such other and further relief as this Court deems proper.

Dated: New York, N. Y.
April 6, 1978

Respectfully submitted,

ALLEN G. SCHWARTZ
Corporation Counsel
Attorney for Plaintiffs
Municipal Building
1 Centre Street, Room 1645
New York, N. Y. 10007
(212) 566-2183/2192

By .....
Rosemary Carroll
Assistant Corporation Counsel

VERIFICATION

STATE OF NEW YORK
COUNTY OF KINGS, *ss.*:

IRVING ANKER, being duly sworn, deposes and says that he is the Chancellor of the City School District of the City of New York; that he has read the foregoing Complaint and knows the contents thereof to be true; and that the source of his information and the basis for his belief is the books and records of the Board of Education of the City School District of the City of New York.

.....
Irving Anker

Sworn to before me this
10th day of April, 1978

Order of Weinstein, J. Dated 4/18/78

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 77 C 1928

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; IRVING ANKER, Chancellor of the City School District of the City of New York; COMMUNITY SCHOOL BOARDS OF COMMUNITY SCHOOL DISTRICTS 1, 7, 9, 12, 13, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29, 30 and 32,

Plaintiffs,

—against—

JOSEPH CALIFANO, JR., Secretary, United States Department of Health, Education and Welfare; HERMAN R. GOLDBERG, Associate Commissioner, Equal Educational Opportunity Programs, United States Department of Health, Education and Welfare; DAVID S. TATEL, Office for Civil Rights, United States Department of Health, Education and Welfare,

Defendants.

ORDER APPEALED FROM

Upon the application of the Board of Education of the City School District of the City of New York and the other plaintiffs, except Community School Board of Community School District 11, for an order pursuant to Rules 56 and 65, Fed. R. Civ. P., (a) rescinding defendants' denial of plaintiffs' application for funding under the Emergency School Aid Act (ESAA), 28 U.S.C. §§1601-1619, and declar-

ing such denial to be violative of that act and of regulations promulgated thereunder, 45 CFR §185.01, *et seq.*, (b) declaring said denial arbitrary and capricious and violative of 5 U.S.C. §702, *et seq.*, (c) restraining defendants as authorized by 5 U.S.C. §705, from disbursing any and all funds in the amount of $3,500,000.00 now earmarked and previously ordered to be set aside and obligated for the ESAA application of plaintiff, Board of Education of the City of New York ("Board of Education") pursuant to this Court's Memorandum and Order of November 18, 1977 and ordering defendants to retain such funding in escrow for the use and credit of the Board of Education pending the determination of this action, and (d) further granting plaintiffs judgment, awarding such to plaintiffs pursuant to its application therefor, and (e) further awarding plaintiffs costs, upon the consideration of affidavits and exhibits submitted in support of plaintiffs' aforesaid application, upon the administrative record, amended verified complaint and all other papers and proceedings heretofore had herein, and upon defendants' cross-motion for judgment, pursuant to Rules 12(b), 12(c) and 56, Fed. R. Civ. P., affirming defendants' decision as supported by substantial evidence in the administrative record and dismissing the complaint, and the plaintiffs having appeared by Allen G. Schwartz, Corporation Counsel, Rosemary Carroll, Assistant Corporation Counsel, and the defendants having appeared by David G. Trager, United States Attorney for the Eastern District of New York, by Richard P. Caro, Assistant United States Attorney, of counsel, and a hearing having been held before this Court on April 12, 1978, and argument having been heard, it is hereby

ORDERED that plaintiffs' application for a temporary restraining order and for judgment reversing defendants' decision finding plaintiffs ineligible for ESAA funds, and other relief, is denied in all respects, and it is further

ORDERED that defendants' motion for judgment affirming the Secretary's determination that the aforesaid plaintiffs, except Community School Board of Community School District 11, are ineligible for ESAA funding for the 1977-78 school year as supported by substantial evidence in the administrative record and dismissing the complaint is granted, and it is further

ORDERED that District 11's eligibility for ESAA funding is not determined by this Order, and it is further

ORDERED that a stay of this Order is granted until 5:00 p.m., April 21, 1978, pending plaintiffs' filing of a Notice of Appeal and motion for an extension of this stay by the Second Circuit Court of Appeals and that pursuant to this stay, HEW is restrained from taking any action whatsoever to distribute, award or allocate the $3.5 million preliminarily set aside and obligated for plaintiffs' 1977-78 ESAA application, and it is further

ORDERED that it is hereby determined that there is no just reason for delay for entry of a final judgment against the moving plaintiffs and that accordingly, pursuant to Rule 54(b), Fed. R. Civ. P., the Clerk of this Court is hereby directed to enter final judgment against all the

plaintiffs, except with respect to the plaintiff, Community School Board of Community School District 11, without costs or disbursements.

Dated: Brooklyn, New York
April 18, 1978

JACK B. WEINSTEIN,
United States District Judge

Letter to Joseph F. Bruno Dated 2/20/79

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 20, 1979

Joseph F. Bruno, Esq.
Assistant Corporation Counsel
100 Church Street
New York, N. Y. 10007

RE: Board of Education of the City School District of the City of New York, et al. v. Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, et al., No. 78-873

Dear Mr. Bruno:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the rules.

The additional docketing fee of $50, Rule 52(a), is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By /s/ JUNE M. HOFFMANN
(Miss) June M. Hoffmann
Assistant Clerk

Enclosures

No. 78-873

In the Supreme Court of the United States

OCTOBER TERM, 1978

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-873

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, the Board of Education of the City School District of the City of New York and its Chancellor, seek review of a court of appeals judgment affirming the decision of the district court which upheld the determination by the United States Department of Health, Education, and Welfare that petitioners were ineligible to receive a grant of federal financial assistance under the Emergency School Aid Act, 20 U.S.C. 1601 *et seq.*, for the 1977-78 school year. Contrary to the petitioners' contention, the decision of the court of appeals does not conflict with this Court's ruling in *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), and raises no question warranting review by this Court.

1. In January, 1977, petitioners submitted applications to the appropriate officials of the Department of Health, Education, and Welfare for funds provided by the Emergency School Aid Act, 20 U.S.C. 1601 *et seq.* ("ESAA") for the 1977-78 school year. Under the ESAA program, federal financial assistance has been provided by Congress to achieve three statutory purposes (20 U.S.C. 1601(b)):

> (1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;
>
> (2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and
>
> (3) to aid school children in overcoming the educational disadvantages of minority group isolation.

Local educational agencies like the petitioners and other eligible organizations compete on an annual basis for a limited amount of financial assistance by submitting plans designed to achieve one or more of these statutory goals, and the applications are ranked according to criteria set out in the statute, 20 U.S.C. 1609(c), as implemented by HEW's regulations, 45 C.F.R. 185.14. By the terms of the statute (20 U.S.C. 1605(d)(4)), no application for assistance can be approved by the Assistant Secretary for Education without a determination that the applicant is not ineligible by virtue of the criteria set out in 20 U.S.C. 1605(d)(1) because it has engaged in specific forms of discrimination (see note 1, *infra*).

Petitioners' basic grant application survived the program merit competition and obtained a sufficient rank

order to be considered for funding in the amount of $3,559,132 (Pet. App. 19). However, HEW determined that the application was ineligible for funding under the regulation found in 45 C.F.R. 185.43(b)(2) as a result of "the assignment [by petitioners] of full-time classroom teachers to [its] schools * * * in such a manner as to identify [one or more] of such schools as intended for students of a particular race, color, or national origin."[1]

2. After pursuing the administrative remedy provided by the statute, petitioners filed a complaint on September 27, 1977, challenging the denial of ESAA funds. They contended that HEW had not determined that petitioners had engaged in intentional discrimination in making the admittedly racially identifiable teacher assignments. The district court initially granted summary judgment in favor of HEW, but, on reargument, remanded the matter to HEW so that petitioners would be given an opportunity to rebut the prima facie statistical evidence of discrimination in teacher assignment (Pet. App. 105-107). On remand, HEW determined that petitioners had discriminated in teacher assignment in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, as well as having failed to establish eligibility for a grant under the ESAA.

---

[1]This regulation implements the provision in 20 U.S.C. 1605(d)(1)(B) making ineligible for funding an applicant which has, after June 23, 1972—

> engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees * * * [.]

The regulation also takes into account 20 U.S.C. 1602(a) which provides:

> It is the policy of the United States that guidelines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

Upon review of the administrative record, the district court affirmed the determination of HEW as supported by substantial evidence and dismissed petitioners' complaint.[2] The court of appeals affirmed the judgment of the district court "on the basis that the standards of the statute and regulation have been satisfied" (Pet. App. 3).

3. Petitioners seek this Court's review of an agency's determination, upheld by two courts, that they are ineligible for a grant of federal financial assistance because they failed to meet the specific eligibility requirements set out in the statute authorizing assistance. Although petitioners claim that this case involves an incorrect interpretation by the court of appeals of the standard of proof required to establish a violation of Title VI of the Civil Rights Act of 1964, as applied by this Court in *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978) (Pet. 10-12), a reading of the opinion filed by the court below demonstrates that it based its decision solely on the requirements of the ESAA statute itself (Pet. App. 23; footnote omitted):

> While appellants argue that HEW's decision to deny ESAA funds relies solely on statistical evidence of disparate impact, contrary to Supreme Court cases construing the Fourteenth Amendment, we need not reach the question whether the evidence supports a finding of purposive segregative intent. Because we are dealing with an act of Congress, as amplified by HEW regulations, and not with a judicial determination whether certain acts have produced a Fourteenth Amendment violation, it is permissible for Congress to establish a higher standard, more protective of minority rights, than constitutional minimus require.

[2]A copy of the district court's order of April 18, 1978, is being lodged with the Clerk.

This Court has repeatedly and consistently upheld the power of Congress to impose reasonable conditions on the receipt of federal grants of financial assistance. *E.g., State of North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D. N.C. 1977), aff'd mem., 435 U.S. 962 (1978); *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143 (1947); *Helvering* v. *Davis*, 301 U.S. 619 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). As the court of appeals recognized (Pet. App. 25), in the ESAA program, Congress intended that school districts be found ineligible for grants not only because of discrimination which would be unconstitutional under the Fourteenth Amendment but also for "discrimination evidenced simply by an unjustified disparity in staff assignments." Here, the evidence as described by the court of appeals (Pet. App. 13-18) demonstrates that petitioners had assigned teachers to schools in a racially identifiable manner and were thus ineligible for assistance under the statute (20 U.S.C. 1605(d((1)(B)) and its implementing regulation (45 C.F.R. 185.43(b)(2)).[3]

[3]We are far from implying that the evidence would not support a finding of violation under Title VI of the Civil Rights Act of 1964 or the Equal Protection Clause. On the contrary, HEW determined, in an administrative proceeding required by the district court, that petitioners' teacher assignments were illegal under the Fourteenth Amendment and Title VI (Pet. App. 22), and the district court affirmed that determination as based on substantial evidence in the record (*ibid.*). These conclusions seem appropriate since "teacher assignment is so clearly subject to the complete control of school authorities * * * that the assignment of an overwhelmingly black faculty to black schools is strong evidence that racial considerations have been permitted to influence the determination of school policies and practices." *Kelly* v. *Guinn*, 456 F. 2d 100, 107 (9th Cir. 1972), cert. denied, 413 U.S. 919 (1973). See also *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

DOJ-1979-01

CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-873

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

—against—

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the Court of Appeals (Pet. App. 1)* is reported at 584 F. 2d 576 (2d Cir. 1978). The opinion of the District Court (Pet. App. 30) is not reported.

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* In this brief, "App." refers to the appendix submitted to this Court; "C.A. App." refers to the appendix submitted to the Court of Appeals; "Pet. App." refers to the appendix to the Petition for Certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on August 21, 1978. A petition for rehearing with a suggestion for a rehearing *en banc* was denied on October 6, 1978. (Pet. App. II). The petition for a writ of certiorari was filed on November 30, 1978, and was granted on February 20, 1979. (App. 153). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Questions Presented

(1) Whether the Court of Appeals erred in holding that the Department of Health, Education and Welfare may reject a school district's application for funding under the Emergency School Aid Act solely on the basis that the school district's teacher assignment policies have a disparate racial impact, and without finding that the policies violate the Equal Protection Clause of the Fourteenth Amendment.

(2) Whether the Court of Appeals erred in holding that discrimination in violation of Title VI of the 1964 Civil Rights Act may be established solely by evidence of disparate impact and therefore that discrimination under the Emergency School Aid Act may be established by the same standard.

(3) Whether the Department of Health, Education and Welfare erred in finding that the New York City Board of Education's teacher assignment policies were violative of the Equal Protection Clause of the Fourteenth Amendment.

Statutes Involved

The Fourteenth Amendment to the Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Emergency School Aid Act, 20 U.S.C. §1601:

> (a) The Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access.
>
> (b) The purpose of this chapter is to provide financial assistance—
>
> (1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;
>
> (2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and
>
> (3) to aid school children in overcoming the educational disadvantages of minority group isolation.

Emergency School Aid Act, 20 U.S.C. §1602:

(a) It is the policy of the United States that guidelines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

(b) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

Emergency School Aid Act, 20 U.S.C. §1605(d)(1):

No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—

(A) transferred (directly or indirectly by gift, lease, loan, sale, or other means) real or personal property to, or made any services available to, any transferee which it knew or reasonably should have known to be a nonpublic school or school system (or any organization controlling, or intending to establish, such a school or school system) without prior determination that such nonpublic school or school system (i) is not operated on a racially segregated basis as an alternative for children seeking to avoid attendance in desegregated public schools, and (ii) does not otherwise practice, or permit to be practiced, discrimination on the basis of race, color, or national origin in the operation of any school activity;

(B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency (or other personnel for whom the agency has any administrative responsibility);

(C) in conjunction with desegregation or the conduct of an activity described in this section, had in effect any procedure for the assignment of children to or within classes which results in the separation of minority group from nonminority group children for a substantial portion of the school day, except that this clause does not prohibit the use of bona fide ability grouping by a local educational agency as a standard pedagogical practice; or

(D) had in effect any other practice, policy, or procedure, such as limiting curricular or extracurricular activities (or participation therein by children) in order to avoid the participation of minority group children in such activities, which discriminates among children on the basis of race, color, or national origin;

except that, in the case of any local educational agency which is ineligible for assistance by reason of clause (A), (B), (C), or (D), such agency may make application for a

waiver of ineligibility, which application shall specify the reason for its ineligibility, contain such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission of the application.

Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

45 C.F.R. §185.43(b) (2):

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility), including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin.

Statement

In April, 1977, the Board of Education of the City of New York ("the Board"), and local community school boards ("CSBs")* submitted a total of 32 applications to the United States Department of Health, Education and Welfare ("HEW") for 1977-78 funding under the Emergency School Aid Act ("ESAA"), 20 U.S.C. § 1601 *et seq.*, to foster integration and eliminate or prevent minority group isolation for approximately 40,000 students in elementary and secondary schools in the New York City school system.

Prior to July 1, 1977, the Board and nineteen CSBs were advised by HEW that their applications met the minimum qualifications for ESAA funding and that approximately $17.5 million had been earmarked as their share of the 1977-78 ESAA appropriation. However, on July 1, 1977, HEW notified the Board and CSBs that they were ineligible for ESAA funding pursuant to 20 U.S.C. § 1605(d)(1)(B) and 45 C.F.R. 185.43(b)(2). (App. 27; Pet. App. 32). Statistics developed by the Office of Civil Rights of HEW in a 1976 Title VI compliance investigation of the New York City school system (App. 7), allegedly demonstrated that teacher assignments in some elementary and junior high schools operated by the CSBs and in some high schools operated by the Board, resulted in their racial identifiability. There was found to be a direct correlation between the numbers of minority teach-

* Under New York State's 1969 "Decentralization Law" (N.Y. Educ. Law §2590-j (McKinney Supp. 1970)), CSBs are vested with primary responsibility for operating the elementary and junior high schools in their districts while the central Board had direct authority over the high schools, special education and other special programs.

ers and the percentage of minority students in some schools when the schools were broken down into groups of low, medium and high minority school population.*

Upon notification of ineligibility, the Board and individual CSB applicants initiated proceedings pursuant to 45 C.F.R. § 185.46. At these proceedings, the Board and CSBs offered proof rebutting the statistical disparity, but HEW ruled that the agency's inquiry would be limited to the accuracy of the statistics upon which HEW made its determination to deny ESAA funding to the New York City applicants. (C.A. App. 319). No substantive rebuttal or explanation for the statistical disparities was considered. On September 16, 1977, HEW issued an opinion adhering to the July 1, 1977 decision denying the applicants ESAA funding.

Thereafter, this action was commenced in the District Court for the Eastern District of New York (Weinstein, J.) by the Board and CSB 11, seeking to enjoin HEW from enforcing its determination of July 1, 1977, that they were ineligible for ESAA funding due to the existence of racially identifiable schools on the basis of teacher assignments.** The action was brought on by

* Other alleged violations of Title VI by the Board were set out in January 18, 1977 and October 4, 1977 letters to Chancellor Anker from the Office of Civil Rights. These issues were voluntarily resolved by the Board and HEW. Teacher assignments remained the only outstanding issue with respect to ESAA eligibility. To resolve this issue the Board and HEW entered into a Memorandum of Understanding (App. 44). *See, infra,* p. 21 (note).

** All other CSBs whose applications met the programmatic minimums for funding, except CSB 10, resolved their conflicts with HEW either at the show cause proceedings or by means of obtaining waivers of ineligibility (20 U.S.C. §1605(d)). Approximately $14 million was released to the eligible CSBs. CSB 10 chose not to contest its ineligibility. After the Court of Appeals decision in this case, CSB 11 also resolved its dispute with HEW, thus leaving the Board as the only remaining party to this action.

order to show cause and included a temporary restraining order requiring HEW to preserve and set aside the ESAA funds earmarked for the Board ($3,559,132) and CSB 11 ($298,891). (App. 56; C.A. App. 1-45, 508-526).

Following review of the administrative record and after a hearing, the Court denied the Board's motion for summary judgment and granted HEW's cross-motion for summary judgment affirming the denial of ESAA funding (App. 72). However, upon the Board's motion for reargument (C.A. App. 266-270), the District Court granted judgment for the Board and CSB 11 and remanded their ESAA applications to defendants for *de novo* consideration consistent with the principles set forth in its opinion. (Pet. App. 30).

The District Court in its opinion rejected HEW's contention that, under ESAA, a school district evidencing statistical racial imbalance could not offer a substantive rebuttal to the statistical showing of segregation. Instead, the Court, citing *Hart v. Community School Board,* 512 F. 2d 37 (2d Cir. 1975), for a foreseeability/intent test, held that constitutional standards apply to ESAA eligibility determinations and that a school district's explanation for the statistical disparity must be considered. The District Court stated:

> Before declaring a school board ineligible for ESAA funds, HEW must find either that (1) the school board was maintaining an illegally segregated school system on June 23, 1972 and it took no effective steps to desegregate after that date or (2) it had a practice after June 23, 1972 that was segregative in intent, design or foreseeable effect. It may rely on statistics alone to make the funding, but it may not ignore

evidence to rebut the inference drawn from the statistics.

(Pet. App. 102-103). The Court remanded the Board's application to HEW for *de novo* consideration of the evidence offered by the Board rebutting HEW's statistical showing of racial disparity.

Upon remand, the Board submitted the following justifications for the racial identifiability of some high schools on the basis of teacher assignment:

(1) The pool of eligible minority teachers tends to concentrate in certain specific license areas (mainly vocational) and is relatively small in many academic and science license areas and, therefore, there are concentrations of minority teachers in high schools which provide a particular type of curriculum. The Board asserted that such concentration, due to factors beyond its control, precludes the random distribution of staff sought by HEW. (App. 7, 90-92; Pet. App. 53-54).

(2) The impact of a court ordered consent decree in *Aspira of New York v. Board of Education* 65 F.R.D. 541 (S.D.N.Y. 1974), requiring the provision of bilingual instruction to Spanish-language dominant children, resulted in the concentration of Hispanic teachers in schools with high percentages of Hispanic children. (App. 83-84, 121-23; Pet. App. 54, 63-64).

(3) Under state law, the appointment of teachers in the high schools is by competitive examination without any identification as to race. HEW, in its November 9, 1976 Title VI non-compliance letter (App. 7) questioned these examinations on the grounds of disparate impact. Nevertheless, there has not been a final administrative or judicial determination that these exams were discriminatory under Title VI or the Constitution. (Pet. App. 57).

(4) Teacher assignments are based on seniority and excessing provisions* which are contained in the collective bargaining agreements between the Board and the teachers' union and, as a matter of preference, teachers choose schools near their homes or schools they otherwise find preferable. Ethnic concentrations are a result. (App. 83-85; Pet. App. 62-63).

(5) HEW's statistical analysis inappropriately included certain schools which were of a specialized nature and which provided a program to a very small number of children (approximately 100 per program) who have serious truancy problems. These programs, called "alternative high schools," attempt to provide a very specialized curriculum which will encourage these students to continue their education. The student population in such programs is largely minority. The teacher staffing is strictly voluntary. Minority teachers have volunteered in higher percentages in these schools. The Board contended that these schools are really select programs and should not be grouped with 1500 to 3000 student high schools. (App. 87-88; Pet. App. 51-52).

(6) Over the past 20 years the trend in the racial composition of the city school system's student popula-

* Excessing denotes the number of teachers in excess of prescribed teacher quotas based on student enrollment. Where enrollment declines schools are required to transfer or excess the least senior employees to receiving schools, that is, schools which have vacancies to be filled.

tion has gone from 68.3% non-minority in 1957 to 32.2% non-minority in 1975. In the high schools the change is more dramatic. In 1960, 79% of the high school population was non-minority. In 1975, only 37.4% was non-minority. Other factors, such as housing patterns, have made for fewer concentrations of contiguous minority and non-minority populations, thereby making certain schools minority dominant. This circumstance has given rise to shifts in the racial identity of schools, without any action on the part of the Board. (App. 76-80). Coupled with the change in the racial identity of city schools is the low teacher vacancy rate at non-minority dominant schools and the inability of the Board to get non-minority staff to teach at many of the minority staff to teach at many of the minority dominant schools. (App. 95-101; C.A. App. 788-791). Further, the Board submitted proof of minimal loss of minority staff from the non-minority dominant schools. (C.A. App. 791).

On March 22, 1978, after the *de novo* review, HEW notified the Board that it again had been found ineligible for ESAA funding (App. 102). HEW's conclusion was bottomed on the statistical racial disparity of faculty assignments in some high schools. However, whereas its initial determination of the Boards' ineligibility focused on disparate teacher assignments in 39 high schools (App. 42-43; Pet. App. 14-15; 584 F. 2d at 583), after the *de novo* review, HEW focused on the disparities in only 10 schools (App. 109-110; Pet. App. 16; 584 F. 2d at 584).*

HEW's *de novo* consideration of the Board's application differed from its original determination only to the extent

* It should be noted that in March of 1978, the Board operated a total of 110 secondary schools. (App. 90).

that it purportedly took into account the Board's rebuttal evidence. In its March 22, 1978 letter HEW indicated that in accordance with the District Court's instructions on its remand, it had applied constitutional standards as set forth in *Hart v. Community School Board,* 512 F. 2d 37 (2d Cir. 1975) and *Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1 (1971) (App. 108, 112-113), in determining whether the Board's teacher assignment policies were grounds for a finding of ineligibility. HEW stated:

> We hereby determine, as required by the court, that on and before June 23, 1972, the City School District of the City of New York discriminated on a racial basis in the assignment of teachers and maintained an illegally segregated system in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and the requirements of the ESAA. We also determine that after June 23, 1972, the district took no effective steps to desegregate the system, which it had illegally segregated and maintained a system of illegal treatment of teachers through discriminatory practices and assignments which were segregative in intent, design, or foreseeable effect. The district has been given an opportunity to rebut the statistical *prima facie* case of discrimination, but its explanations are not persuasive.
>
> • • • • •
>
> It is our finding that the assignments of minority, particularly black and Hispanic teachers, as well as other teachers in your school district are such that they could have come about only through foreseeable acts of discrimination. The data demonstrating that minority teachers were concentrated in schools at all levels with a predominance of minority students was extensively set out in the November 9, 1976, letter from

> OCR, in our ESAA denial letter of July 1, 1977, and in the evidence presented to Judge Weinstein in *Board of Education v. Califano.* Equally important is the fact that schools which at all levels were predominantly non-minority in student population, often are staffed by few and sometimes no minority teachers.

(App. 107-108).

On April 12, 1978, the Board again applied to the District Court for a preliminary injunction against enforcement of the March 22, 1978 decision. (App. 127; C.A. App. 281-283, 496-507). The Court consolidated the preliminary injunction application with trial of the action on the merits and on April 12, 1978, rendered a decision denying the Board's application for injunctive relief and sustaining HEW's March 22, 1978 finding on the basis that the HEW determination was supported by substantial evidence in the administrative record. (App. 127-128; C.A. App. 833-839). In its order (App. 149-152), the District Court stayed distribution of any funds by HEW for nine days to permit the filing of an appeal by the Board.

On April 12, 1978, the Board filed a notice of appeal with the United States Court of Appeals for the Second Circuit. (C.A. App. 843). Thereafter, the Board applied for a stay of the disbursement of the approximate $3.5 million ESAA funds pending appellate review. On April 28, 1978, a stay pending a determination of the appeal was granted.

The Court of Appeals rendered its decision on August 21, 1978. It held that it was unnecessary to determine whether the evidence supported a finding of purposeful segregative intent. (Pet. App. 23-24; 584 F. 2d at 577-588). Instead, Judge Oakes, writing for the Court, affirmed the result reached by the District Court on the ground that the

evidence supported a finding of discrimination under a disparate impact test:

> Here [in ESAA], Congress intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an unjustified disparity in staff assignments.

(Pet. App. 25; 584 F. 2d at 588).

The Court of Appeals went even further, and observed that "the district court's remand to HEW was, * * * erroneous, though immaterial here." (Pet. App. 27; 584 F. 2d at 590). Implicit in this observation is support for HEW's initial test of ESAA ineligibility which was found to be improper by the District Court. Under that test, statistical racial disparity in staff assignments *per se* is sufficient to sustain a finding of ineligibility. The statistics may be rebutted only to the extent of establishing that there was a miscalculation; justifications for the disparities are not considered.

On September 5, 1978, petitioners filed a petition for rehearing with a suggestion for a rehearing *en banc.* This stayed the issuance of the Court of Appeals' mandate, thereby preserving the $3.5 million fund earmarked for the Board. The petition was denied on October 6, 1978. On October 26, 1978 the Board moved in the Court of Appeals for a stay of the issuance of its mandate, and thus disbursement of the $3.5 million fund, pending application to this Court for a writ of certiorari. The motion was granted on October 31, 1978. The petition for a writ of certiorari was filed on November 30, 1978 and was granted on February 20, 1979 (App. 153). Under Rule 41(b) of the Rules of Appellate Procedure, the Court of Appeals' stay of the issuance of its mandate has been continued.

Summary of Argument

In part I of our argument we demonstrate, based upon the plain meaning of the Emergency School Aid Act ("ESAA") and upon an extensive examination of its legislative history, that it was not Congress' intent to permit the Department of Health, Education and Welfare ("HEW") to find an applicant ineligible for ESAA funding due to its staff assignment policies unless those policies constitute discrimination violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution. This is clear from the distinction drawn between staff assignment policies and staff demotions or dismissals as bases for ineligibility. 20 U.S.C. §1605(d)(1)(B). An applicant must have actually "engaged" in "discrimination" in the assignment of staff to be held ineligible for funding, whereas staff demotions or dismissals will trigger ineligibility where there is simply "disproportionate" impact. *Id.* We further point out that the Court of Appeals' reliance on 20 U.S.C. §1602(a) as mandating a disparate impact test for determining ESAA ineligibility was misplaced. The legislative history reveals that section 1602(a) is a policy statement and by no means intended to alter or affect the substantive eligibility standards set forth in section 1605(d)(1)(B).

We next note the role of Title VI of the 1964 Civil Rights Act as prohibiting discrimination in all Federally funded programs, and thus contend that Title VI's test for determining discrimination is applicable to determining discrimination and eligibility under ESAA. The argument is then made, in light of this Court's *Bakke* decision (*Regents of the University of California v. Bakke,* 438 U.S. 265 (1978)), as well as the legislative history of Title VI, that

in fact, contrary to the inference which might be drawn from *Lau v. Nichols,* 414 U.S. 563 (1974), Title VI's test for discrimination is precisely the same as that imposed under the Equal Protection Clause, *i.e.,* a test based on segregative intent. *See generally, Dayton v. Brinkman,* 433 U.S. 406 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Washington v. Davis,* 426 U.S. 229 (1976); *Keyes v. School Dist. No. 1, Denver, Colorado,* 413 U.S. 189 (1973). Part I of our argment thus establishes that the Court of Appeals erred in holding that the disparate impact test applies to determinations of ESAA eligibility where staff assignment policies are in issue.

In part II of our argument we discuss the holdings of this Court, in *Dayton, Arlington Heights, Davis* and *Keyes,* which require a showing of purposeful or intentional discrimination in order to establish a violation of the Equal Protection Clause. We point out that HEW failed to apply or even refer to these cases in concluding that the Board's teacher assignment policies were discriminatory. Instead, HEW relied upon a test for determining intentional discrimination which infers intent from policies or practices that have the "foreseeable" result of discrimination. *See, Arthur v. Nyquist,* 573 F. 2d 134 (2d Cir. 1978), *cert. den. sub nom., Manch v. Arthur,* —— U.S. ——, 99 S.Ct. 179 (1978); *Hart v. Community School Board,* 512 F. 2d 37 (2d Cir. 1975). We argue that, unlike the Second Circuit, this Court has not adopted the foreseeability test as a means of demonstrating an Equal Protection violation and thus HEW's analysis was deficient. Moreover, we demonstrate that even assuming the viability of the foreseeability test, HEW's purported finding that the Board's teacher assignment policies had the foreseeable consequence of segregation was based solely on statistical evidence of disparate impact. Such an analysis is clearly inconsistent with this

Court's holdings in *Arlington Heights, et al.*, and, in fact, fails to even meet the test set forth in *Arthur* and *Hart*.

It is next argued that on the evidence in this case, HEW could not have rationally determined that the racially disparate staffing pattern in some New York City public high schools was the product of intentional segregative conduct by the Board.

We finally point out that HEW erred in relying on *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), in alleging that the racial identifiability of some high schools on the basis of teacher assignment constituted a violation of the Equal Protection Clause. *Swann's* language that disproportionate staff assignments constitute a *prima facie* case of intentional discrimination was meant to apply to determining the permissible scope of court-ordered desegregation in dual school systems. This Court's decision in *Keyes v. School Dist. No. 1, supra*, 413 U.S. 129, clearly demonstrates that *Swann's* holding is not applicable where, as in the case of the Board, there is no history of *de jure* segregation.

Based upon this analysis, we urge that the judgment of the Court of Appeals should be reversed and this matter remanded to the District Court with directions that the Board should be awarded appropriate declaratory and injunctive relief.

ARGUMENT

I.

The Court of Appeals erred in holding that a test of disparate impact based on teacher assignments may be used to determine eligibility for funding under the Emergency School Aid Act.

In this case the Court of Appeals held that ESAA itself requires application of an impact test in determining eligibility for funding. The Court also held that Title VI incorporates such a test and thus the school staffing patterns here in question violated Title VI. On this ground as well the Court held that the Board was ineligible for funding. Both holdings are incorrect. Neither ESAA nor Title VI imposes such a test.

A. *The legislative history of ESAA overwhelmingly indicates that in enacting this statute Congress intended to adopt the constitutional test of discrimination.*

(1)

Title VII of the Education Amendments of 1972*, the Emergency School Aid Act, 20 U. S. C. §1601, *et seq.*, is intended to provide additional funds to local educational agencies for the purpose of assisting them in the process of eliminating or preventing minority group isolation and in improving the quality of education for all children. 20 U.S.C. §1601. To that end, educational agencies may apply for grant assistance for certain authorized activities, including special remedial services, provision of additional and specially trained staff, counselling, career education,

* Pub. L. No. 92-318, Title VII, §§701-720, 86 Stat. 354 (1972).

interracial programs, bi-lingual programs and other projects, such as educational television, all geared toward eliminating minority group isolation and maintaining a high level of educational quality. 20 U. S. C. §§1606-1608, 1610.

Funds available under ESAA for distribution to eligible local educational agencies are apportioned by the Assistant Secretary of the Office of Education pursuant to 20 U. S. C. §1604 and the regulations promulgated thereunder. 45 CFR §185.01 *et seq.* Applications are reviewed in accordance with the requirements and criteria set forth in 20 U.S.C. §§1609 and 1616. ESAA is a competitive funding program. Only those applications containing the greatest programmatic merit will be successful.

To be eligible for assistance, an educational agency must establish that it is implementing a desegregation plan which is either court ordered or approved by the Secretary of HEW as adequate under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, or has adopted or is implementing or will implement a voluntary plan to eliminate or reduce racial isolation in its school system. 20 U.S.C. §1605(a).

There are, however, certain non-programmatic limitations on eligibility. No educational agency shall be eligible for funding if, after June 23, 1972, it has engaged in one of the enumerated prohibited practices, policies or procedures set forth in 20 U.S.C. §1605(d)(1)(A)-(D). At issue in this case in section 1605(d)(1)(B) which provides, in pertinent part, that the local educational agency is rendered ineligible if it "engaged in discrimination based on race, color or national origin in the hiring, promotion or assignment of employees of the agency * * *." *See also,* 45 C.F.R. 185.43 (b)(2).

If a local educational agency is found to be ineligible by reason of §1605(d)(1)(A)-(D), it may make an application for a waiver of ineligibility to the Secretary of HEW pursuant to the requirements set forth in section 1605(d)(1) and 45 C.F.R. §185.44.* If the waiver is granted, funding is available nothwithstanding the initial finding of ineligibility.

The ESAA legislation was the subject of extensive debate and consideration in three separate sessions of Congress.** As originally introduced, Congress described the purpose of ESAA as meeting "added costs of special programs and staff required for effective desegregation and for meaningful efforts to reduce, eliminate or prevent the isolation of

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* The issue of when a waiver of ineligibility is available is presently pending before the Court of Appeals for the Second Circuit in the related case of *Board of Education v. Califano,* 78 Civ. 2135 (E.D.N.Y. filed December 22, 1978) (Weinstein, J.), which arose out of HEW's denial of the Board's application for 1978-79 ESAA funding. As in the instant case, HEW found the Board ineligible for 1978-79 ESAA funds on the basis of the alleged discriminatory impact of the Board's teacher assignment policies. The Board then applied for a waiver of ineligibility, which HEW denied. The District Court has remanded the Board's application for a waiver of ineligibility back to HEW for reconsideration in light of the Court's opinion. The Court rejected HEW's interpretation of ESAA that a waiver is available only when the allegedly discriminatory policies *and* their *effects* have "ceased to exist." 20 U.S.C. §1605(d). The District Court held that a halt to the alleged practices or policies combined with a plan which would lead to an elimination of all effects in the future would satisfy the requirements for obtaining a waiver of ineligibility. The Court also entered an injunction mandating that HEW preserve the 1978-79 ESAA funds which the Board would have received (were it not for the determination of ineligibility and denial of its application for a waiver). The District Court order prevents the loss of 1978-79 ESAA funds ($2.4 million) pending HEW's review of the Board's phased plan to eliminate the effects of allegedly discriminatory policies and the outcome of the instant case.

** *See,* the appendix to this brief for a capsulized history of the ESAA legislation.

minority group children" and "to bring about better integrated quality education." 116 Cong. Rec. 44410, 91st Cong. 2d Sess. (1970) (remarks of Sen. Griffin); 116 Cong. Rec. 17122, 91st Cong. 2d Sess. (1970) (remarks of Sen. Javits).* *See also,* 117 Cong. Rec. 511, 92d Cong. 1st Sess. (1971) (remarks of Rep. Bell indicating that the use of ESAA funds would "range across the educational spectrum"); H. Rep. No. 92-576, p. 3, 92d Cong. 1st Sess. (1970); *Board of Education of the City School District of New York v. Califano,* 584 F. 2d 576, 578 (2d Cir. 1978), *quoting* S. Rep. No. 92-604, 92d Cong. 2d Sess. (1972).

ESAA was considered and enacted during a time of heated debate both in Congress and throughout the nation over how (or even whether) to desegregate all our nation's schools. The focus of the debate was the *de jure-de facto* distinction. *De jure* segregated systems were subject to court ordered desegregation pursuant to this Court's holding in *Brown v. Board of Education,* 347 U.S. 483 (1954). *De facto* segregation, the type of segregation which occurred outside the South, was not actionable. ESAA was conceived as a means of aiding the dual school systems of the South to carry out the mandated desegregation plans while at the same time providing a financial impetus to *de facto* segregated systems to voluntarily desegregate. Thus, ESAA was not intended to *mandate* a change of *status quo.* It is not a civil rights enforcement statute.* ESAA was intended simply to provide the financial means to eradicate school segregation throughout the country, regardless of its "cause or origin." 20 U.S.C. §1602(a).

* Under ESAA, civil rights violations will only result in an applicant's ineligibility for funding (20 U.S.C. §1605(d)) or a cutoff of ESAA funds if the violations are discovered after funding has been provided (45 C.F.R. §185.45). Under Title VI, on the other hand, a violation may trigger the loss of all federal funding.

Representative Dennis stated the purpose of ESAA clearly in deliberations on H.R. 19446, a significant predecessor to the later enacted ESAA statute:

> This bill does not, I will agree, mandate or compel an end to de facto segregation resulting from neighborhood living patterns; but it exercises a powerful influence in that direction by making available massive sums of federal money to assist school corporations, which are willing to develop and submit plans for that purpose, to avoid or minimize such de facto segregation * * *.

116 Cong. Rec. 43141, 91st Cong. 2d Sess. (1970). *See also,* 117 Cong. Rec. 10747, 10749, 92d Cong. 1st Sess. (1971) (remarks of Sen. Pell).

Thus, the intent of Congress in enacting ESAA was to expand eligibility for ESAA funds to the North and South and to encourage the limitation or prevention of minority isolation or segregation wherever it exists. For funding purposes, *de jure-de facto* distinctions were ignored.

(2)

The July 1, 1977 letter (App. 27) of HEW notifying the Board that its 1977-78 ESAA application was denied presented statistics which allegedly demonstrated that teacher assignments in some high schools operated by the Board resulted in their racial identifiability. On the basis of this statistical finding alone, HEW originally contended that the Board was ineligible for ESAA funds under section 1605(d)(1)(B). HEW asserted that the disparate pattern of teacher staffing *per se* constituted a violation of ESAA and that the Board's only grounds for rebuttal would be a showing that HEW's statistics were incorrect.

While agreeing with HEW that the disparate impact test is applicable to determination of ESAA eligibility, the Court of Appeals has apparently adopted a less extreme version of this test than HEW. The Court of Appeals considered, along with HEW's statistics, the Board's rebuttal argument that its policies and practices were racially neutral and that the alleged racial identifiability of schools on the basis of teacher assignment was caused by external factors beyond the Board's control. Nevertheless, the Court of Appeals found the Board's arguments to be inadequate to rebut the *prima facie* showing of discrimination under the disparate impact test and upheld the finding of the Board's ineligibility under section 1605(d)(1)(B). The Board respectfully submits that the plain language of this section and its legislative history does not support a finding that ESAA ineligibility on the basis of discriminatory staff assignments may be established by means of a disparate impact test.

Section 1605(d)(1)(B) provides:

> No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—
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> • • • •
>
> (B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency (or other personnel for whom the agency has any administrative responsibility) • • •.

The reference to any practice or policy which "results in the disproportionate demotion or dismissal" of personnel is the only language in ESAA which ties in a disparate impact test with ESAA eligibility. Significantly, the reference to discriminatory teacher assignments as a ground for ineligibility is not linked to disproportionate result, but rather to actual discrimination. The plain meaning of the section is that purely statistical evidence may result in ineligibility *only* where demotion or dismissal of personnel in conjunction with desegregation activities is in issue.

The analysis of the language contained in section 1605(d)(1)(B) by the Senate Committee on Labor and Public Welfare clearly demonstrates that Congress intended that statistical evidence be determinative of ESAA eligibility only with respect to personnel demotion or dismissal—not personnel assignment. The Committee report noted:

> *Clause* (B) of paragraph (1) [Section 1605(d)(1)(B)] renders ineligible for assistance any local educational agency which has, after the date of enactment of the Act, (1) had in effect any practice, policy, or procedure which results, or has resulted, in the disproportionate demotion or dismissal of instructional or other personnel from minority groups, in conjunction with desegregation of public schools or the establishment of an integrated school, or (2) engaged in discrimination on the basis of race, color, or national origin in the promotion or assignment of employees of the agency, or of other personnel for whom the agency has any administrative responsibility, even though such other personnel are not employees of the agency.
>
> This clause renders ineligible any local educational agency which discriminates in its employment practices, and specifically *presumes one practice* to be dis-

> criminatory: the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregating its schools or establishing integrated schools.

Sen. Rep. No. 92-61 p. 41, 92d Cong. 1st Sess. (1971) (emphasis added).

Thus, the Senate Committee in considering section 1605 (d)(1)(B) made a significant and conscious distinction between the language of the section which relates to "demotion or dismissal" and that which relates to "hiring, promotion or assignment." The Committee made it clear that one and only one practice—demotion or dismissal in conjunction with desegregation activities—is presumed to be discriminatory if disproportionate or disparate impact exists.* The converse is, therefore, clear. Ineligibility due to staff assignment policies, which are in issue in this case, requires a showing of more than disproportionate or disparate impact. Ineligibility on the basis of staff assignment policies requires actual "discrimination" on the basis of race, color or national origin.

* The remarks of Senator Mondale shed light upon the rationale for the increased concern with demotions and dismissals and the consequent more stringent eligibility standard applied in ESAA:

> [T]here has been wholesale firing of black teachers and principals in the South. No one seems to argue that any more. And as far as I know, very few cases have been brought by the Justice Department. That is a tragedy.
>
> • • • •
>
> There have been allegations by the National Education Association that several thousand black teachers have been fired in the South or demoted. I would like to see lawsuits brought on that.

117 Cong. Rec. 10762, 92d Cong., 1st Sess. (1971). *See also,* 117 Cong. Rec. 11339, 92d Cong., 1st Sess. (1971) (remarks of Sen. Allen.) At this point in the ESAA debates, the attorneys fees provision was under consideration (20 U.S.C. §1617). Senator Mondale viewed the failure of the Department of Justice to take adequate steps to prevent dismissals of black teachers and transfers of property to private segregated schools as a prime reason for including an attorneys fees section in ESAA in order to encourage private enforcement actions.

The word "discrimination" as used in section 1605(d) is not defined in ESAA.* *Board of Education, Cincinnati v. Department of H.E.W.*, 396 F. Supp. 203, 225 (S.D. Ohio 1975), *aff'd in part, rev'd in part on other grounds,* 532 F.2d 1070 (6th Cir. 1976). In the context of ESAA eligibility, however, it has been construed to mean intentional conduct which violates the Equal Protection Clause:

> [D]iscrimination refers to a denial of Equal Protection. It is recognized that school authorities have a constitutional obligation not to engage in discrimination in this sense [*citing Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1, 13 (1971)].
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> • • • •
>
> Discriminatory acts, then, are those which violate the Constitution, and discrimination is another way of referring to de jure segregation.

Board of Education, Cincinnati v. Department of H.E.W., supra, 396 F.Supp. at 225. *See also, Bradley v. Milliken,* 432

* Nor is it defined in Title VI of the 1964 Civil Rights Act, *Regents of the University of California v. Bakke,* 438 U.S. 265, 286 (1978) (Powell, J.), or Title IV of the 1964 Civil Rights Act. *Board of Education, Cincinnati v. Dept. H.E.W., supra,* 396 F. Supp. at 225. For the purposes of Title VI, it has been construed to mean conduct which violates the Equal Protection Clause. *Regents of the University of California v. Bakke, supra,* 438 U.S. at 287 (Powell, J.), *id.* at 338-340 (Brennan, J.). *See also, Laufman v. Oakley Bldg. & Loan Co.,* 408 F. Supp. 489, 499 (S.D. Ohio 1976) ("discrimination" under Title VI means a denial of equal protection).

F.Supp. 885, 886-887 (E.D. Mich. 1977)*. This construction of the word discrimination is supported by the fact that in 1972, when ESAA was enacted by Congress, discrimination in the context of school segregation meant no less than officially sanctioned, *de jure* segregation. *Swann v. Charlotte-Mecklenburg Board of Education,*** 402 U.S. 1 (1971); *Green v. County School Board,* 391 U.S. 430 (1968); *Brown v. Board of Education,* 347 U.S. 483 (1954). In enacting ESAA, Congress made it clear that it did not intend to change any substantive legal standards as defined by this Court with regard to what constituted actionable segregation:

> • • • H. R. 2266 [House version of proposed ESAA] does not alter in any way the legal aspects of desegregation. Its purpose is to help school districts see that existing law is enforced.

117 Cong. Rec. 38492, 92d Cong. 1st Sess. (1971) (remarks of Rep. Dellenback). *See also,* 117 Cong. Rec. 39112, 92d

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* In *Bradley,* the court found that since no finding of *de jure* segregation with respect to teacher assignments was made, there was no violation of 45 C.F.R. §185.43 (b)(2), and, thus, the Detroit Board of Education should be eligible for ESAA funding.

** *Swann* was decided on April 20, 1971, during the time that the 92d Congress, 1st Session, was debating S. 1557, the proposed ESAA legislation. *See,* 117 Cong. Rec. 10957 (1971) (remarks of Sen. Ervin), *id.* at 10960 (remarks of Sen. Dominick). *Swann* and its companion cases concerned remedying the state imposed dual school systems of the South. The decision in *Swann* prompted a number of senators to criticize this Court for not having ruled on the constitutionality of the *de facto* segregation which occurred outside the South. *See, e.g., id.* at 10956 (remarks of Sen. Mondale). Not until *Keyes v. District No. 1,* 413 U.S. 189 (1973), did this Court rule on the legality of a segregated system outside the South. *Keyes* re-focused the *de jure-de facto* distinction into a question as to whether there is a purpose or intent to discriminate. *Id.* at 208. *See also, Washington v. Davis,* 426 U.S. 229, 240 (1976), and our discussion of *Swann, infra,* at pp. 63-66.

Cong. 1st Sess. (1971) (remarks of Rep. Conyers); 116 Cong. Rec. 42232, 91st Cong. 2d Sess. (1970) (remarks of Rep. Reid). Congress deferred to this Court for the definition of actionable segregation:

> If the Supreme Court • • • at some future time declares purely *de facto* segregation to be unconstitutional—then the Congress will confront a new situation which it must then consider. At this point in time desegregation does not mean mathematical racial balance • • • .

116 Cong. Rec. 43140, 91st Cong. 2d Sess. (1970) (remarks of Rep. Ashbrook). *See also,* 117 Cong. Rec. 38490, 92d Cong. 1st Sess. (1971) (remarks of Rep. Price). Senator Mondale also made the point:

> The Supreme Court said [in *Swann v. Charlotte-Mecklenburg*] that there is a Constitutional remedy and a legal remedy for situations where the races are separated because of official governmental action • • • but there is no such remedy and there is no such Constitutional protection and right as yet where the races are separated for reasons other than official government action.

117 Cong. Rec. 11520, 92d Cong. 1st Sess. (1971). *See also,* 117 Cong. Rec. 11516-11517, 11328-11329, 92d Cong. 1st Sess. (1971) (remarks of Sen. Javits). Thus, Congress was acutely aware that discrimination meant intentional official action in violation of the Equal Protection Clause, and did not intend to advance the definition of discrimination beyond the parameters set by this Court. The use of the word "discrimination" in Section 1605(d)(1)(B), evidences congressional intent that such policies

not be grounds for ineligibility unless they constitute violations of the Equal Protection Clause as construed by *Brown v. Board of Education, supra,* and cases thereafter.

Finally, the legislative debate on ESAA specificially demonstrates that ESAA was not intended to require racial balancing of staff as a prerequisite to eligibility. The following colloquy between Representative Esch and Representative Pucinski, ESAA's sponsor in the House and the Chairman of the Sub-Committee on Education and Labor, which considered ESAA at length, illustrates the point:

> Mr. Esch. I would like to inquire of the gentleman from Illinois, who is chairman of the subcommittee which produced the bill this amendment incorporates, about one critical aspect of eligibility for assistance under this amendment. Will the Secretary be authorized to apply the holding in the Singleton case [*Singleton v. Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1969)—which is that you have to have a perfect racial balance in the faculty in every single school in your district]—as a condition or requirement for assistance under this program?
>
> Mr. Pucinski. The answer is absolutely not. As the gentleman knows, this holding has been applied to applications for assistance under the emergency school assistance program—because that program had no requirements spelled out in legislation and the Secretary applied court decisions as eligibility requirements. He could not do so under this amendment because the amendment is very specific in its terms and imposes no such requirement. If it did, very few school districts could qualify. The Secretary will have to apply the eligibility requirements spelled out in this amendment and those do not include racial balancing of faculty and staff in every school.

117 Cong. Rec. 39332, 92d Cong., 1st Sess. (1971).* Accordingly, although statistical evidence may be relevant in determining eligibility under ESAA, statistical disparity in staff assignments cannot be sufficient, without more, to find a local educational agency ineligible for funding.

(3)

The holding of the Court of Appeals that the disparate impact test applied to determinations of ESAA eligibility was primarily based on its reading of 20 U.S.C. § 1602(a).** The Court concluded that section 1602(a)'s language that the guidelines and criteria of ESAA "be applied uniformly * * * without regard to the origin or cause of * * * segrega-

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* Representative Esch's reference to "this amendment" refers to the proposed ESAA in its entirety. ESAA was being considered in the form of an amendment to the Higher Education Act of 1965, Pub. L. 89-329.

** 20 U.S.C. §1602 provides:

Policy with respect to application of certain provisions of Federal law

(a) It is the policy of the United States that guidelines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

(b) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

tion" (Pet. App. 25; 584 F.2d at 588-589), evidenced Congressional intent that HEW apply a standard stricter than the constitutional intent test to determinations of ESAA eligibility. The Board respectfully submits that in so holding, the Court of Appeals misconstrued the intent of Congress in adopting this provision.

As discussed previously (*supra*, at p. 23) for the purposes of funding educational agencies, the distinction between *de jure* and *de facto* segregation was erased in ESAA. That is, where the ESAA applicant had a court ordered or HEW approved plan or a voluntary plan for the elimination of segregated conditions in its elementary or secondary public schools, ESAA funding was available. 20 U.S.C. § 1605. So long as the plan met the statutory prerequisites for funding, it was not relevant whether the segregated condition had been brought about by *de jure*, official governmental acts, or by *de facto*, non-official causes such as voluntary housing patterns.* Thus, in this sense, ESAA erases the distinction between *de jure* and *de facto* discrimination:

> This measure • • • does away with the distinction between de facto and de jure; it says to the North and South you have problems which must be dealt with; and it provides a mechanism for a local educational agency to alleviate those problems.

117 Cong. Rec. 10747, 92d Cong. 1st Sess. (1971) (remarks of Sen. Pell). *See also*, 117 Cong. Rec. 10762, 92d Cong. 1st Sess. (1971) (remarks of Sen. Mondale).

* It should be noted that Congress recognized that much of so-called *de facto* segregation was bottomed on intentional discriminatory governmental policies. *See, e.g.*, 117 Cong. Rec. 10763, 92d Cong. 1st Sess. (1971) (remarks of Sen. Mondale); *id.* at 11511-12 (remarks of Sen. Eastland).

Within this context, it is apparent that the policy statement contained in section 1602(a) is not intended to restrict eligibility for ESAA funding. Instead, this provision simply proclaims as a statement of policy that ESAA funding is available to all segregated school systems attempting (voluntarily or otherwise) to desegregate, notwithstanding whether their segregated conditions were caused by official or non-official factors. HEW's reading of this provision, as adopted by the Court of Appeals, that section 1602(a) is intended to apply the restrictive disparate impact test to ESAA eligibility determinations, is thus inconsistent with both the plain meaning of this section and the underlying purpose of ESAA.

Moreover, examination of the history of the Senate's version of ESAA, the "Emergency School Aid and Quality Integrated Education Act of 1971", S. 1557, 92d Cong. 1st Sess. (1971), indicates that the Court of Appeals' reliance on section 1602(a) was misplaced. Senate 1557 was amended on April 22, 1971, to include a policy statement commonly known as the "Stennis amendment." *See*, 117 Cong. Rec. 11520, 92d Cong. 1st Sess. (1971). This amendment included the language that now comprises both sections 1602(a) and 1602(b), and thus the history of this amendment is relevant to section 1602(a).* The Stennis amendment provided:

> *Policy with respect to the application of certain provisions of Federal Law*
>
> Sec. 2. It is the policy of the United States that the guidelines and criteria established pursuant to Title VI

* The language found in section 1602(a) had its origin in H.R. 10338 (§2 (a)(B)), 92d Cong. 1st Sess. 1971), a version of ESAA proposed by Representative William Ford. *See*, 117 Cong. Rec. 29185-86, 92d Cong. 1st Sess. (1971). Neither the House debates nor the House report on ESAA (H. Rep. 92-576, 92d Cong. 1st Sess. (1971)), shed light on the effect to be accorded this language.

> of the Civil Rights Act of 1964, Section 182, of the Elementary and Secondary Education Amendments of 1966 *and this Act*, shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

117 Cong. Rec. 11508, 92d Cong. 1st Sess. (1971) (emphasis added).*

The inclusion of a policy statement in ESAA that the guidelines and policy of ESAA and Title VI of the 1964 Civil Rights Act shall be applied uniformly without regard to the cause or origin of segregation, stemmed from the view of some southern senators, as well as some northerners, that school desegregation was a burden unfairly imposed only on southern states. Senator Stennis and his supporters complained that due to the *de jure* origins of segregated conditions in the South, under *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny, only southern school systems were forced to undergo desegregation. They asserted that northern school districts, many of which were just as segregated as their southern counterparts, were immune from court or administrative mandated desegregation due to the *de facto* nature of their segregated schools. For example, Senator Stennis stated:

> The States in the South are being vigorously prosecuted and pursued by both the executive and judicial departments of the Federal Government, with drastic and effective demands for total integration of the races in our public school systems. At the same time, even though segregation in public schools exists on a very large scale in extensive areas outside the South —and in many instances on a much larger scale than in the South—these schools outside the South have a virtual immunity from demands for desegregation of the races.

116 Cong. Rec. 14098, 91st Cong. 2d Sess., (1970). *See also*, 117 Cong. Rec. 11508-9, 92d Cong., 1st Sess. (1971) (remarks of Sen. Stennis); 118 Cong. Rec. 5176-77, 92d Cong. 2d Sess. (1972) (remarks of Sen. Allen); 117 Cong. Rec. 11511-2, 92d Cong. 1st Sess. (1971) (remarks of Sen. Eastland); *id.* at 11510, (remarks of Sen. Tower); *id.* at 10960, (remarks of Sen. Ribicoff). It was, thus, the concern of Senator Stennis and his supporters that some steps be taken to develop a uniform nationwide policy with respect to school desegregation. This policy was embodied in the Stennis amendment.

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* Since the House version of ESAA contained only the section 1602(a) language, and the Senate version contained a provision incorporating the language of both sections 1602(a) and (b), the House-Senate Conference Committee chose to delete the reference to "this act" from the Senate version and include both policy statements in the final bill. Conference Report No. 798, 92d Cong. 2d Sess. (1972), *reprinted in* 1972 U.S. Code Congressional and Administrative News at 2663. Debates following the submission of the conference report to the Senate demonstrate the applicability of the Senate debates on the Stennis amendment to the relevant language of section 1602(a):

> The amendment offered by the junior Senator from Mississippi (Mr. Stennis) has been brought back unchanged in spite of great opposition on the part of the House. Indeed to assuage the House we also include their version of the Stennis amendment. Some would ask why we did this. In answer, the House amendment covered only the emergency school aid provision itself, while the Senate amendment also covered title VI of the Civil Rights Act and Section 182 of the Elementary and Secondary Education Amendments of 1966. Here we have the agreeable option of taking one provision from each bill to accomplish the same end.

118 Cong. Rec. 18438, 92d Cong. 2d Sess. (1972) (remarks of Sen. Pell).

The language contained in the Stennis amendment was conceived as a broad statement of policy, intended only to encourage the executive branch of government to seek the application of Federal desegregation efforts to *de facto* segregated school districts:

> All my amendment says is that it is the policy of the legislative branch that this operation [desegregation] • • • shall be applied throughout the Nation in the same way, whether the history is de facto, so called, or de jure, so called.

117 Cong. Rec. 11508, 92d Cong. 1st Sess. (1971) (remarks of Sen. Stennis).

Senator Stennis went on to say:

> What is the matter with this proposal? Why should not Congress light just one little lamp that might shed some light whereby the officials could find their way? I believe there has been so little activity beyond the South, and so many years have passed and so many promises have been made, that somewhere down the line there should be a slowdown signal, and I think Congress is one branch of Government that at least can light that little candle. It is very small. Some say this proposal does not have any meaning.
> Well, if it does not have any meaning, it will do no harm. But I think it does have meaning. I think there is a great principle behind it.
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> • • • •
>
> [The Stennis Amendment] does not set any time table. It does not call for any drastic action. It just says that the policy applied by HEW ought to be nationwide.

Id. at 11509.

It is apparent that Senator Stennis saw his amendment to S. 1557 as constituting a broad message to the executive branch of government that it was time to move against *de facto* segregation. But there is nothing to indicate he intended to incorporate substantive legal standards with respect to ESAA eligibility, as the Court of Appeals concluded. Even Senator Ribicoff, the Senate's principal proponent of comprehensive legislation to achieve nationwide desegregation,* and a supporter of the Stennis Amendment, indicated that the Stennis Amendment was devoid of substantive legal standards:

> Some argued last year that the Stennis Amendment was only a declaration of policy and did not implement any affirmative program in the North. Many of these same Senators yesterday voted against a program that would implement this declaration of policy and begin for the first time a program of school integration in the North. Nonetheless, I continue to support the Stennis amendment for I feel it is critical for the Senate to declare at least a policy of ending segregation in the North as well as the South.
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> • • • •
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> The question is what are we going to do about this crisis? The amendment proposed by the Senator from Mississippi would at least declare a policy of integration in the North as well as the South. This would be

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* Senator Ribicoff was the sponsor of an amendment to ESAA (*see*, 117 Cong. Rec. 10747, 92d Cong. 1st Sess. (1971)), and the "Urban Education Improvement Act of 1971," S. 1283, 92d Cong. 1st Sess. (1971), which would have required nation-wide school desegregation on a metropolitan-wide basis. Both his amendment to ESAA and the bill were defeated.

> a small but still significant step forward and I will vote for his amendment.

117 Cong. Rec. 11511, 92d Cong. 1st Sess. (1971).*

The lack of substantive standards in the Stennis amendment is further demonstrated by the remarks of those senators who opposed its adoption. In fact, the basis for the opposition to Senator Stennis' proposal was that it enunciated a policy with respect to eradicating *de facto* segregation that could not be effectuated by substantive law. The amendment's provision that ESAA, Title VI and the Education Amendments of 1966 be applied uniformly throughout the United States led to the fear among the Stennis amendment's opponents that if *de facto* discrimination could not be acted upon, the policy of uniformity could prevent further challenges to *de jure* discrimination. Senator Mondale, a key supporter of ESAA, stated in this regard:

> What causes me to oppose the amendment of the Senator from Mississippi knowing, as I do, the good faith in which it is offered—is that I think it would be used to argue that until you can find a remedy for a situation for which there is no remedy today [*de facto* segregation], under present Supreme Court decisions, you should lay off law enforcement in situations of official discrimination, throughout the Nation, where there is both a duty and a remedy to correct the separation of the races.

* Senator Ribicoff's reference to the consideration of the Stennis amendment "last year" refers to its inclusion in the Elementary and Secondary Education Act of 1970, P.L. 91-230, 42 U.S.C. §2000d-6. The reference to the vote against a program which would "implement" the Stennis amendment refers to the defeat of his proposals discussed above.

117 Cong. Rec. 11519, 92d Cong. 1st Sess. (1971). *See also, id.* at 10760-61, 11517.

Senator Javits, a major proponent of the ESAA legislation, in his criticism of the Stennis amendment echoed Senator Mondale's concerns that the amendment might inhibit school desegregation efforts. 117 Cong. Rec. 11514-11516, 92d Cong. 1st Sess. (1971). Most significantly, however, his problems with the Stennis amendment did not extend to that portion of it addressed to applying ESAA's criteria and guidelines uniformly without regard to the cause or origin of segregation, and presently embodied in section 1602(a). He viewed this language merely as expressing ESAA's purpose of funding school districts attempting to eradicate both *de jure* and *de facto* segregation:

> Again, the amendment of the Senator from Mississippi is not confined to this act, I would say to him, if he had confined his amendment to this act, I could have a rather different attitude toward it because in this act for $1.5 billion we are trying to do everything we can about both kinds of segregation.

117 Cong. Rec. 11516, 92d Cong. 1st Sess. (1971.)*

In Senator Javits' view, the uniform policy pronounced in the language now comprising section 1602(a) was not objectionable. What was objectionable to him was requiring the application of a uniform policy with respect to Title VI where there were no substantial legal standards at that time that would permit a uniform policy concerning *de jure* and *de facto* segregation to exist. *Id.*

* Senator Mondale's initial remarks on the Stennis amendment reveal that he, like Senator Javits, primarily objected to the reference to Title VI and the Education Amendments of 1966 in the amendment. *See,* 117 Cong. Rec. 10760-10761, 92d Cong. 1st Sess. (1971).

This review of the history of the Stennis amendment demonstrates that neither the proponents nor the opponents of this proposal in the Senate saw the predecessor to section 1602(a) and (b) as containing legal standards which would justify HEW adopting the restrictive disparate impact test for ESAA eligibility. Sections 1602(a) and (b) are reflections of Congress' grave concern over school desegregation efforts as well as its hesitancy to take comprehensive and decisive action to chart its course. *See,* 117 Cong. Rec. 10949, 92d Cong. 1st Sess. (1971) (remarks of Sen. Ribicoff); 116 Cong. Rec. 14098, 91st Cong. 2d Sess. (1970) (remarks of Sen. Stennis). Neither provision, but especially not section 1602(a), is addressed to the conditions of ESAA eligibility. Thus, the reliance by the Court of Appeals on section 1602(a) as the basis for holding that "Congress intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an unjustified disparity in staff assignments" (Pet. App. 25; 584 F. 2d at 588) is without support in the language of the statute or its legislative history.

B. *The relationship between ESAA and Title VI of the 1964 Civil Rights Act.**

(1)

The Court of Appeals relied on Title VI as an additional basis for its holding that a disparate impact test is applicable to determinations of ESAA eligibility. The Court

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* Pub. L. No. 88-352, Title VI, §§ 601-605, 78 Stat. 253 (1964). Section 601, 42 U.S.C. § 2000d, provides:

> *Nondiscrimination in federally assisted programs*
>
> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

held that discrimination under Title VI may be demonstrated by disparate impact and that ESAA incorporates the same standard:

> Moreover the ESAA proscription against employment discrimination forbids discriminatory acts and practices which violate statutory civil rights provisions such as Title VI of the Civil Rights Act of 1964.

Pet. App. 25; 584 F. 2d at 589.

While the Board disagrees with the Court of Appeals' holding in this case that ESAA creates an independent justification for HEW's determination of ineligibility, it does agree with the Court of Appeals that ESAA's standards for determining eligibility for funding in this case are co-extensive with the standards for determining racial discrimination under Title VI.

Title VI was designed to police Federal funding programs in order to insure that local agencies and institutions do not use the Federal largesse to further racially discriminatory activities. *Regents of the University of California v. Bakke,* 438 U.S. 265, 284 (1978) (Powell, J.). As stated by the House Judiciary Committee,

> This title [Title VI] declares it to be the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving Federal financial assistance and authorizes and directs the appropriate Federal departments and agencies to take action to carry out this policy.

House Rep. No. 914, 88th Cong. 1st Sess. (1963), *reprinted in* 1964 U.S. Code Cong. and Ad. News, 2391 at 2400. *See*

also, 110 Cong. Rec. 6544, 88th Cong. 2d Sess. (1964) (remarks of Sen. Humphrey).

Nowhere is Title VI's enforcement role more evident than in Federal programs designed to fund local educational agencies. Section 182 of the 1966 Amendments to the Elementary and Secondary Education Act of 1964,* the enactment that provides the New York City Board of Education with more than one-half of all its Federal reimbursement funding,** was actually codified as an addition to Title VI (*i.e.,* 42 U.S.C. §2000d-5). Section 182 provides for the application of various procedural rights to local educational agencies found to be in violation of Title VI and thus threatened with a denial of funding under this major program.

ESAA is cut from the same mold. The statute and implementing regulations provide that ESAA eligibility may be predicated on a plan for desegregation approved by HEW under Title VI. 20 U.S.C. 1605(a)(1); 45 C.F.R. §185. 11(a)(2). Indeed, at least two Federal court decisions support the link between ESAA and Title VI. *Bradley v. Milliken,* 432 F. Supp. 885 (E.D. Mich. 1977); *Robinson v. Vollert,* 411 F. Supp. 461 (S.D. Tex. 1976). It was held in *Bradley* that:

> ESAA does not enhance HEW's power to apply eligibility criteria above and beyond Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

432 F. Supp. at 887. In so holding, the court in *Bradley* relied on *Robinson,* where the issue was whether ESAA permitted HEW to review the sufficiency of a Federal court

* P.L. 89-750 §182, 80 Stat. 1209

** By comparison, the $3.5 million in contested ESAA funds amount to less than 5% of the Board's 1977 Federal reimbursement funding.

desegregation order in determining whether ESAA's eligibility requirements had been met. After a review of ESAA's legislative history in a futile attempt to identify the relevant congressional intent, the court turned to Title VI for guidance. Title VI, the court in *Robinson* found, is "intimately related" to ESAA and therefore the rule under Title VI would apply to ESAA as well. *Robinson v. Vollert, supra,* 411 F. Supp. at 475.

Support for the link between the ESAA and Title VI is further found in ESAA's legislative history. During the hearings on the proposed ESAA before the Senate Committee on Labor and Public Welfare, Senator Mondale asked Secretary Finch of HEW whether a school district which was racially discriminating in the assignment of teachers would be eligible for ESAA funds. Secretary Finch replied that the district would not be eligible because it would not meet the requirements of Title VI. *Hearings on S. 3883 Before the Senate Committee on Labor and Public Welfare,* 91st Cong. 2d Sess. at 58 (1970). Similarly, Representative Hawkins remarked,

> Administratively title VI of our Civil Rights Act has not been used in the vigorous and decisive manner we intended. For the first time, H.R. 19446 [proposed ESAA of 1970] would give us a specific program of desegregation with the financial aid needed to obtain results and with criteria to measure enforcement.

116 Cong. Rec. 43141, 91st Cong. 2d Sess. (1970).

Thus, the Court of Appeals was correct in looking to Title VI for the definition of discrimination.* Its error, however, was in its analysis of Title VI. Title VI incor-

* Significantly, in the instant case, the determination of ESAA ineligibility was based, in large part, on the 1976 Title VI compliance investigation conducted by the HEW Office of Civil Rights. (App. 7, 28, 29; Pet. App. 19; 584 F.2d at 585-586).

porates a constitutional test for determining what constitutes discrimination.

C. *The test for discrimination under Title VI.*

Until this Court's recent landmark decision in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), the test for determining racial discrimination under Title VI, while disputed, appeared to be the disparate impact test. *Lau v. Nichols,* 414 U.S. 563, 568 (1974).* In *Lau,* this

* In *Lau,* plaintiffs, non-English speaking Chinese students, brought a class action against the San Francisco Unified School District under the 14th Amendment and Title VI alleging unequal educational opportunities in that they were denied a bilingual education. Both the District Court and the Court of Appeals (483 F.2d 791 (9th Cir. 1973)) denied relief under the Constitution and Title VI. The Court of Appeals in essence held that the inherent disabilities of the students were not to be attributed to the school system. This Court, in not reaching the constitutional issue, held under Title VI that "[d]iscrimination is barred which has that effect even though no purposeful design is present * * *." 414 U.S. at 568.

There is judicial authority prior to and after *Lau* to support the proposition that "the same showing is required to establish a violation of 42 U.S.C. 2000d (Title VI), as is required to make out a racial discrimination violation of the Fourteenth Amendment's Equal Protection Clause." *Goodwin v. Wyman,* 330 F. Supp. 1038, 1040 n.3 (S.D.N.Y. 1971), *aff'd* 406 U.S. 964 (1972); *Gilliam v. City of Omaha,* 388 F. Supp. 842, 847 (D. Neb. 1975), *aff'd* 524 F. 2d 1013 (8th Cir. 1975); *Ward v. Winstead,* 314 F. Supp. 1225, 1235 (N.D. Miss. 1970) *appeal dismissed,* 400 U.S. 1019 (1971). *See also, Jefferson v. Hackney,* 406 U.S. 535, 549-550 n. 19 (1972) (where an intent test applicable to Title VI may be implied); *Bossier Parish School Board v. Lemon,* 370 F. 2d 847 (5th Cir. 1967), *cert. denied* 388 U.S. 911 (1975); *Taylor v. Cohen,* 405 F.2d 277, 281 (4th Cir. 1968); *United States v. Tatum Independent School Dist.,* 306 F. Supp. 285, 288 (E.D. Tex. 1969) *aff'd* 447 F.2d 441 (5th Cir. 1971); *United States v. State of Texas,* 321 F. Supp. 1043, 1056-57 (E.D. Texas 1970); *NAACP Western Region v. Brennan,* 360 F. Supp. 1006, 1012 (D.D.C. 1973); *Association of Gen. Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955, 968 (C.D. Calif. 1977), *judgment vacated* —— U.S. ——, 98 S. Ct. 3132, 3133 (1978).

After *Lau,* a number of Federal courts have held that the disparate impact test is applicable to Title VI. *See, e.g., Serna v. Portales Municipal Schools,* 499 F.2d 1147 (10th Cir. 1974); *Lora v. Board of Education,* 456 F.Supp. 1211 (E.D.N.Y. 1978); *Child v. Beame,* 425 F. Supp. 194 (S.D.N.Y. 1977).

Court indicated that under some circumstances a cause of action under Title VI could be established in the absence of evidence of purposeful and intentional discrimination. Where statistical evidence revealed that programs receiving Federal funds had an adverse effect on a particular racial group, this would be sufficient to support a *prima facie* finding of racial discrimination under Title VI. *Lau's* approach to Title VI was altered, however, by this Court's decision in *Bakke. Bakke* establishes that the constitutional or purposeful intent standard is the correct standard for determining whether discrimination in violation of Title VI has taken place.

In *Bakke,* this Court was faced with the question of whether a state university's special admission program for disadvantaged racial minority students violated the Equal Protection Clause of the Fourteenth Amendment and Title VI. A threshold question considered by Justice Powell was whether the standard for determining racial discrimination under Title VI differed from the standard for determining racial discrimination under the Constitution. After reviewing the congressional debates on Title VI, Justice Powell concluded that "[f]urther evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term 'discrimination.'" *Bakke, supra,* 438 U.S. at 286. *See also, id.* at 284-5 (Powell, J.). Justice Powell then held that, "[i]n view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287. Similarly, in an opinion in which Justices White, Marshall and Blackmun joined, Justice Brennan stated:

> In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies***.

Id. at 328. Justice Brennan proceeded to reinforce this interpretation of Title VI and in the process to cast grave doubt on the continued viability of *Lau v. Nichols*:

> Since we are now of the opinion, for the reasons set forth above, that Title VI's standard * * * is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision [*Lau*].
>
> However, even accepting *Lau's* implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent in the least.

438 U.S. at 352-353. *See also, id.* at 385 (White, J.) and *id.* at 402 (Blackmun, J.). Clearly, a majority of this Court in *Bakke* has established that Title VI's standard for determining racial discrimination is coextensive with the standards of the Equal Protection Clause of the Fourteenth Amendment.

(2)

The legislative history of Title VI clearly supports this view. Title VI is a product of Congress' concern over the unacceptably slow pace of desegregation required by *Brown v. Board of Education*, 347 U.S. 483 (1954). The focus of Congress' concern in enacting Title VI was to prevent the disbursement of Federal funds to recipients who were acting in a manner which violates the Equal Protection Clause, or, in the case of a private recipient, would violate the Equal Protection Clause if done by the state. In introducing Title VI in the House, Representative Celler,

the chairman of the Judiciary Committee and floor manager of the Civil Rights legislation, stated:

> It would assure Negroes the benefits now accorded only white students in programs of high education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association.

110 Cong. Rec. 1519, 88th Cong. 2d Sess. (1964). He later stated:

> In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination.
>
> It is for these reasons that we bring forth title VI. The enactment of title VI, will serve to override specific provisions of law which contemplate Federal assistance to racially segregated institutions.*

Id. at 2467.**

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* *See, e.g.*, the Hill Burton Act, former 42 U.S.C. § 291e(f) (1958).

** Representative Celler also filed a memorandum discussing the proposed Civil Rights Act. 110 Cong. Rec. 1251, 88th Cong. 2d Sess. (1964). In that memorandum it was urged that the Constitution mandated that the government prevent racial discrimination by the recipients of Federal aid; otherwise the government might become a partner in discrimination. *Id.* at 1527-1528. As stated in

These remarks and those of other supporters of the House bill establish that Title VI was introduced to clarify for all recipients of Federal grants-in-aid that the Fifth and Fourteenth Amendments prohibit discrimination in such programs. *See,* 110 Cong. Rec. 2467, 88th Cong. 2d Sess. (1964) (remarks of Rep. Lindsey); *id.* at 2481 (remarks of Rep. Ryan). *See generally, Hearings on H.R. 6890, 87th Cong. 2d Sess. before the Subcommittee on Integration in Federally Assisted Public Education Programs of the House Committee on Education and Labor,* at 14-15, 18, 20, 21, 32, 37-38.

The Senate debates on Title VI further demonstrate that Title VI was intended to do no more than authorize termination of Federal funding where recipients engage in conduct prohibited by the Equal Protection Clause. For example, Senator Ribicoff stated:

> Basically, there is a constitutional restriction against discrimination in the use of Federal funds and title VI simply spells out the procedure to be used in enforcing that restriction.
>
> • • • •
>
> Title VI implements these basic principles. It provides a fair and reasonable procedure for making sure that the Constitution is observed and for making sure that discrimination in the use of Federal funds is ended.

110 Cong. Rec. 13333, 88th Cong. 2d Sess. (1964). *See also, id.* at 7102. Similarly, Senator Humphrey stated:

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the memorandum, "• • • Congress clearly has the power to legislate so as to insure that the Federal Government does not become involved in a violation of the Constitution." *Id.*

> The existing law of the land is stated in section 601 [42 U.S.C. § 2000d]. Sections 602 and 603 [42 U.S.C. § 2000d-2 and § 2000d-3] of H.R. 7152 do not represent an extension of that law. Those latter sections represent no new power.

110 Cong. Rec. 5254, 88th Cong. 2d Sess. (1964). He then went on to state:

> So what does section 601 do? It states the law, it repeats the law • • •.

Id. See also, id. at 5252, 5865, 13442 (remarks of Sen. Humphrey).

The colloquy between Senators Pell and Pastore also provides evidence that Title VI was not intended to provide any rights other than those already established under the Equal Protection Clause:

> Mr. Pell: Is it not true that the philosophy of title VI is already in the law? The authority is permissive. Title VI would merely extend it, but would not bring in a new concept. Is that correct?
>
> Mr. Pastore: The Senator is correct.

110 Cong. Rec. 7064, 88th Cong. 2d Sess. (1964).*

In enacting Title VI, Congress was concerned with giving effect to the constitutional prohibitions against discrimination. The doctrines set forth in this Court's decision in *Brown v. Board of Education* had yet to be realized, and Congress saw Title VI as a means to reaffirm *Brown's* principles and to effectuate its mandate. No new standard more

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* *See also, id.* at 7102 ("title VI does not create any new legal or administrative powers") (remarks of Sen. Javits); *id.* at 7057, 7062 (remarks of Sen. Pastore); *id.* at 12675, 12677 (remarks of Sen. Allott); *id.* at 13333 (remarks of Sen. Morse).

stringent than those required by the Equal Protection Clause were intended.*

(3)

Despite this Court's in depth analysis of Title VI in *Bakke,* the Court of Appeals totally ignored *Bakke* in holding that the disparate impact test applies to Title VI and ESAA eligibility.**

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* Further support for the view that Congress did not intend Title VI to prohibit conduct other than that prohibited by the Equal Protection Clause may be found by reference to Title IV of the 1964 Civil Rights Act. 42 U.S.C. 2000c *et seq.* Section 2000c-6 authorizes the Attorney General to bring civil actions in district court to compel school desegregation, and provides in pertinent part:

> * * * nothing herein shall * * * enlarge the existing power of the court(s) to insure compliance with constitutional standards.

In *Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1 (1971), this Court interpreted Title IV, as follows:

> On their face, [42 U.S.C. §§2000c(b), 2000c-6] purport only to insure that Title IV of the Civil Rights Act of 1964 will not be read as granting new powers. The provision in §2000c-6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause.

Id. at 17 (emphasis in original). Clearly, if when enacting these provisions of Title IV it was Congress' intent to insure that constitutional standards in school desegregation cases would not be exceeded, Congress could not have intended for Title VI, enacted on the same day, to be used in school discrimination cases as a way of expanding the Federal role in combating segregation. *Parents Association of Andrew Jackson High School v. Ambach,* Slip Op. 2225, 2244-2245 (2d Cir. April 17, 1979).

** On the other hand, the Court of Appeals did specifically cite *Bakke's* apparent approval of a disparate impact test under Title VII of the 1964 Civil Rights Act. Pet. App. 24-25; 584 F.2d at 588 n. 39. Ironically, in a case decided by the Court of Appeals shortly after the instant case, *Fullilove v. Kreps,* 584 F. 2d 600 (2d Cir. 1978), the same panel that decided the instant case concluded that *Bakke* held that " 'Title VI goes no further in prohibiting the use of race than the equal protection clause of the Fourteenth Amendment itself.' " *Id.* at 608 n. 15, *citing Regents of University of California v. Bakke,* 438 U.S. at 325, 98 S. Ct. at 2767 (Brennan, J.); *id.* at 438 U.S. at 287, 98 S. Ct. at 2747 (Powell, J.).

However, in a very recent decision, a different panel of the Court of Appeals for the Second Circuit has apparently reconsidered Judge Oakes' decision in the instant case concerning the applicable test for discrimination under Title VI. In *Parents Association of Andrew Jackson High School v. Ambach ("Jackson"),* Slip op. at 2225 (2nd Cir. April 17, 1979), a class action for injunctive relief under 42 U.S.C. §1983 and 42 U.S.C. §2000d, brought by minority parents to desegregate a high school in New York City, the Court of Appeals discussed the Title VI test for discrimination:

> Plaintiffs urge, nevertheless, that a desegregation order may be predicated upon the Civil Rights Act of 1964, arguing that under Title VI, 42 U.S.C. §2000d, segregation *effects* alone without discriminatory intent, establish a prima facie violation. We think, however, that Title VI does not authorize federal judges to impose a school desegregation remedy where there is no *constitutional* transgression—*i.e.,* where a racial imbalance is merely *de facto.*

Slip op. at 2244 (emphasis in original). The court, citing *Swann v. Charlotte Mecklenburg Board of Education, supra,* 402 U.S. at 17, held that an action to desegregate schools under Title VI would not lie "without a showing of *de jure* discrimination * * *." *Id.* at 2245 (emphasis in original). In so holding, the Court of Appeals noted Justice Powell's conclusion in *Bakke* that Title VI proscribes only those racial classifications that would violate the Fourteenth Amendment. The Court found that Justice Powell and "[f]our other Justices * * * also apparently rejected the implication of *Lau v. Nichols,* 414 U.S. 563 (1974)) that impact alone, without discriminatory intent, is, in some contexts, sufficient to establish a prima facie violation of Title VI" and held that " 'Title VI's

standard * * * is no broader than the Constitution's * * *.'" Slip op. at 2245, *citing Bakke, supra,* 438 U.S. at 352. The Court of Appeals conceded that while *Lau* was not expressly overruled in *Bakke,* "further word from the Supreme Court on [*Lau's*] vitality as precedent" was necessary. Slip op. at 2246.

The Court of Appeals, noting the pendency of the instant case in this Court, observed that the court below "did not expressly consider the impact of the *Bakke* opinion on the continued authority of *Lau v. Nichols.*" *Id.* The Court of Appeals in *Jackson* concluded, however, that Judge Oakes' opinion in this case might still have continued vitality since it found that the instant case "examined Title VI standards in the context of claims of teacher *employment* discrimination, and the court accordingly drew an analogy to the standards applicable under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e *et seq.*" *Id.* (emphasis in original). The *Jackson* court then stated that had the instant case been analogous of Title IV of the 1964 Civil Rights Act, 42 U.S.C. 2000c *et seq., i.e.,* a desegregation case like *Jackson,* then a constitutional intent standard would have applied. Slip Op. at 2246.

It is respectfully submitted that this attempt by the *Jackson* court to distinguish the instant case, and in doing so to introduce a bifurated analysis under Title VI, is incorrect. *Jackson* was itself correctly decided, in accordance with what we have here argued was the intent of Congress in enacting Title VI. And that intent should as much govern here as it did in *Jackson.* The Court of Appeals in *Jackson* was incorrect in suggesting that this case could somehow be properly viewed as an employment discrimination case governed by Title VII standards. The issue of racial identifiability of schools due to staff assignments was never raised in the instant case in the context of

employment discrimination (Title VII).* The question in this case is whether the Board has assigned staff "in such a manner as to identify any * * * schools as intended for students of a particular race * * *." 45 C.F.R. §185.43(b)(2). At issue, therefore, is school segregation—not employment discrimination. Indeed, Judge Oakes' references to Title VII in this case were merely by example or analogy to establish that other titles of the Civil Rights Act of 1964, such as Title VII, incorporated a disparate impact standard, and therefore it was conceivable that Title VI might contain a similar standard. Pet. App. 23-25; 584 F. 2d at 588 (text and n. 39). Thus, the *Jackson* court's finding that Judge Oakes' opinion had examined Title VI in the context of employment discrimination as a justification for the failure of the court below to consider *Bakke's* impact on *Lau* is totally without merit.

The bifurcated view of Title VI adopted in *Jackson,* presumably out of deference to the panel which decided this case, was not essential to the result reached in *Jackson.*

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* Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, provides in pertinent part:

> Discrimination because of race, color, religion, sex, or national origin
>
> (a) Employers. It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or priviliges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Indeed, it seems obvious that the *Jackson* court wished to avoid the implication of Judge Oakes' opinion for that case. But it bears noting that adoption of such a bifurcated analysis would result in the Title VI standard of discrimination varying from case to case, depending on the particular analogy seized upon by the reviewing court (*i.e.*, employment discrimination versus school segregation). This defies logic and is contrary to this Court's Title VI analysis in *Bakke*. Furthermore, the bifurcation of Title VI is antithetical to the intent of Congress in enacting this provision. Senator Humphrey, a dominant force in the enactment of the Civil Rights Act of 1964, stated:

> Many of us have argued that the issue of nondiscrimination should be handled in an overall, consistent way for all Federal programs, rather than piecemeal, and that it should be considered separately from the merits of particular programs of aid to education, health, and the like. This bill gives the Congress an opportunity to settle the issue of discrimination once and for all, in a uniform, across-the-board manner, and thereby to avoid having to debate the issue in piecemeal fashion every time any one of these Federal assistance programs is before the Congress.

110 Cong. Rec. 6544, 88th Cong. 2d Sess. (1964).

The legislative history of this statute and the controlling decisional law construing it leave no room for the Courts at this late date to bifurcate the standard for determining discrimination under Title VI. Title VI contains one standard for determining discrimination; it is the very same standard as that required to make out a finding of violation of the Equal Protection Clause.

II

HEW failed to establish that the Board's teacher assignment policies constituted intentional discrimination.

(1)

This Court has clearly established that disproportionate impact alone, without proof of intentional of purposeful discrimination, is insufficient to support a finding of a violation of the Equal Protection Clause of the Fourteenth Amendment. *Dayton v. Brinkman,* 433 U.S. 406 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Washington v. Davis,* 426 U.S. 229 (1976); *Keyes v. School Dist. No. 1, Denver, Colorado,* 413 U.S. 189 (1973).

In *Keyes v. School District No. 1,* this Court in ruling on a claim of alleged unconstitutional segregation in a northern school system held:

> • • • in the case of a school system like Denver's where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists, but also that it was brought about or maintained by intentional state action.

413 U.S. at 198. The importance of the *Keyes* decision lies in the distinction the Court made between *de jure* and *de facto* segregation. Only intentional, *de jure,* segregation was held to be sufficient to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment.

In *Washington v. Davis,* 426 U.S. 229 (1976), this Court reaffirmed *Keyes* and conclusively put an end to the use of an impact inquiry as a substitute for a finding of actual discriminatory purpose or intent: "[d]isproportionate im-

pact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination forbidden by the Constitution." *Id.* at 242. This Court stated that in school desegregation cases "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* at 240.

The following year this Court once again focused on this impact/intent distinction and held that the relatively greater adverse impact on minorities caused by a village's refusal to rezone an area for low and moderate income housing did not, absent proof "that discriminatory purpose was a motivating factor in the Village's decision," violate the Equal Protection Clause. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 (1977). *Arlington Heights* establishes that determining that invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into circumstantial and direct evidence of intent. It suggested the following guides to analysis before reaching that determination: (1) the impact of the official action on race is a relevant starting point and may be conclusive in some cases where the pattern is stark [*citing Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)]; (2) the historical background of the policy is a factor especially if it reveals a series of official actions taken for invidious purpose; (3) the specific sequence of events leading up to the alleged policy or practice at issue with special note to departures from normal procedural sequence; (4) the legislative or administrative history is a relevant factor. 429 U.S. at 265.

Most recently in *Dayton v. Brinkman*, 433 U.S. 406 (1977), this Court reaffirmed *Arlington Heights* and *Davis* in a school desegregation case. *Dayton* held:

> The duty of both the District Court and the Court of Appeals * * * is to first determine whether there was any action in the conduct of the business of the school board which was intended to and which did in fact discriminate against minority pupils, teachers and staff.

Id., at 420.

(2)

Nowhere in its March 22, 1978 letter to the Board (App. 102)* did HEW even refer to the test for intentional discrimination set forth in *Dayton, Arlington Heights, Davis* and *Keyes*. In fact, pursuant to the District Court's decision (Pet. App. 100-101), HEW relied solely on statistical evidence of disparate impact in finding that the Board's policies had "the natural and foreseeable consequence of causing educational segregation", which, HEW contended, constituted intentional discrimination in violation of the Equal Protection Clause (App. 112), *citing Hart v. Community School Board*, 512 F.2d 37, 50 (2d Cir. 1975). *See also, Arthur v. Nyquist*, 573 F.2d 134 (2d Cir. 1978), *cert. den. sub nom. Manch v. Arthur*, —— U.S. ——, 99 S.Ct. 179 (1978).**

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* The March 22, 1978 letter provided, in pertinent part:

> It is our finding that the assignments of minority, particularly black and Hispanic teachers, as well as other teachers in your school district are such that they could have come about only through foreseeable acts of discrimination. The data demonstrating that minority teachers were concentrated in schools at all levels with a predominance of minority students was extensively set out in the November 9, 1976, letter from OCR, in our ESAA denial letter of July 1, 1977, and in the evidence presented to Judge Weinstein in *Board of Education v. Califano*. Equally important is the fact that schools which at all levels were predominantly non-minority in student population, often were staffed by few and sometimes no minority teachers. (App. 108).

** Despite this Court's pronouncements with respect to the requisites for establishing equal protection violations, some courts

In so holding, HEW was incorrect. As we have demonstrated above, the intent of Congress in enacting ESAA and Title VI, as well as Title IV of the 1964 Civil Rights Act, was to make the test for discrimination under these statutes coextensive with the constitutional test for discrimination. This test is enunciated in *Dayton, Arlington Heights, Davis* and *Keyes,* not in the Second Circuit's *Hart-Arthur* decisions. The Court of Appeals for the Second Circuit has itself shown uncertainty as to the continued viability of the *Hart-Arthur* test, (*see, Parents Association of Andrew Jackson High School v. Ambach, supra,* slip op. at 2238), and, we submit, that test is clearly insufficient as a constitutional test for discrimination. Indeed, in *Arlington Heights,* Justice Powell chose not to include foreseeability as one of the factors he suggested were probative on the issue of discriminatory purpose. *See,* 429 U.S. 250, at 265.*

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have held that plaintiff may establish a constitutional violation by showing that the action or inaction of the defendant had the natural foreseeable effect of fostering segregation. This showing will give rise to a presumption of intent which can be rebutted. The defendants must show that the action or inaction was taken in a manner consistent with the absence of segregative intent or that alternative policies were not available which could have accomplished the same goal with less segregation. *See, Arthur v. Nyquist,* 573 F.2d 134, 142 (2d Cir. 1978), *cert. den. sub nom. Manch* v. *Arthur,* —— U.S. ——, 99 S.Ct. 179 (1978); *School District of Omaha v. United States,* 565 F.2d 127, 128 (8th Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978); *Hart v. Community School Board,* 512 F.2d 37 (2d Cir. 1975); *Oliver v. Michigan State Board of Education,* 508 F.2d 178 (6th Cir. 1974), *cert. denied,* 434 U.S. 1064 (1978). *See generally,* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,* 56 Yale L.J. 317, 322-343 (1976). In the Board's view, the foreseeability test adopted by HEW is inconsistent with this Court's holdings in *Arlington Heights, Davis, Dayton* and *Keyes.*

* To the extent the foreseeability test is meant to be a means of either (1) inferring actual intent or (2) holding parties to a proper standard of care when they are performing certain types of acts, we believe it is important to bear in mind the countervailing consideration that, given the virtually infinite range of possible activities in which a school board or official may engage and the demands which may be made upon that board or official attempting to conduct the affairs of government, this type of test has a great potential for making conduct unlawful which was never intended to be actionable under the Fourteenth Amendment or the various civil rights statutes. That is, it would render conduct unlawful which could by no stretch of the imagination be considered purposively discriminatory. For example, consider a racially neutral seniority system or the employment rules considered in *New York City Transit Auth. v. Beazer,* —— U.S. ——, 47 U.S.L.W. 4291 (March 27, 1979). Or consider the disparate racial impact that would result from abandonment by the Federal government of the CETA program or other programs for the disadvantaged, or implementation by some Federal agency of a hiring policy imposing rigorous education standards. All of these would have a racially disproportionate impact, but presumably are not unlawful.

By the same token, fair account must be taken of the vast array of other facially neutral, but in fact racially skewed, factors with which public as well as private employers must contend. In certain circumstances, as with employment examinations or school assignment or siting decisions, it might be fair to base a finding of discrimination in large part on the theory that a disparate impact which cannot survive strict scrutiny as to necessity is suspect. *See, e.g., Swann v. Charlotte-Mecklenburg,* 402 U.S. 1, 18 (1971), discussed *infra. But see,* this Court's Title VII analysis in *New York City Transit Auth. v. Beazer, supra,* 47 U.S.L.W., at 4295-4296, where in the context of claimed employment discrimination a strict scrutiny test was not applied, only a test of reasonable relatedness. *Compare,* Mr. Justice White's analysis of this question. 47 U.S.L.W., at 4300. In most other situations, as here, the factual context in which action is taken is far more complex, and government conduct cannot be so blithely characterized as discriminatory.

Moreover, even assuming that the *Hart-Arthur* "foreseeability" test for determining constitutionally proscribed discrimination can somehow be viewed as consistent with this Court's rulings in *Dayton, Arlington Heights, Davis* and *Keyes,* it is inescapable that the foreseeability test was not met in this case. *Hart* and *Arthur* require that HEW affirmatively demonstrate that the Board's "*actions* * * * have the natural and foreseeable consequence" of increasing or perpetuating segregation in

order to raise a presumption of segregative intent. *Hart, supra,* 512 F.2d at 50 (emphasis added). *See also, Arthur, supra,* 573 F.2d at 142-143. Here, HEW did not focus on the Board's actions or policies in establishing a presumption of segregative intent, but rather relied solely on statistics.* In effect, HEW's analysis of "foreseeability" in this context is entirely circular; it notes the fact of disparity, and then proceeds to infer that this disparate effect must have been intentionally caused because it was, in some abstract sense, foreseeable (App. 107-108). This is clearly a bootstrap analysis of the question of intent.

Essentially, then, HEW's finding of ESAA ineligibility in this case, both in its initial determination and following the *de novo* proceeding upon remand, was based on nothing more than its original statistical finding of disparate staffing patterns. Even assuming this statistical showing was sufficient to require rebuttal by the Board, in the face of the Board's evidentiary submission made to HEW pointing to the numerous and varied racially neutral factors which had in fact caused this disparity, there was no way HEW could rationally conclude that this disparity was the result of purposively discriminatory action taken by the Board. *See generally, Arlington Heights, supra,* 429 U.S. at 270-271 n. 21, *citing Mt. Healthy City School Dist. Bd. of Education v. Doyle,* 429 U.S. 274 (1977).

While the disparate staffing pattern in this case is apparent, the historical background of the alleged discriminatory policy or practice shows a sequence of events without any hint of invidious purpose. Teacher assignments in the

* The March 22, 1978 letter stated:

> The district has been given an opportunity to rebut the statistical *prima facie* case of discrimination but its explanations are unpersuasive.

(App. 107). *See also, supra,* footnote at p. 57.

New York City public high schools are made pursuant to the results of racially neutral competitive examinations. N.Y. Educ. Law §§2569, 2573, 2590-j(3) (App. 80-81, 96-97, 99; Pet. App. 9-10, 584 F.2d at 581). There was no evidence that teacher assignments and appointments from eligible lists violated the statutory scheme (C.A. App. 43). Although the HEW Office of Civil Rights alleged in 1976 that these exams were violative of Title VI (App. 13-15), there has never been a final administrative or judicial determination of a Title VI violation. Moreover, HEW's allegation of a Title VI violation was based on alleged disparate impact, not intentional discrimination. (App. 14). Thus, in light of *Bakke, supra,* the allegation of a Title VI violation is without merit.

In order to explain the disparate staffing statistics, the following factors, *inter alia,* were relied upon at the administrative level as precluding the random distribution of minority teachers throughout all the high schools.* Racially neutral teacher seniority and excessing provisions contained in collective bargaining agreements resulted in non-minority teachers choosing or remaining in schools near their homes or schools that they otherwise found preferable. (App. 83-85; Pet. App. 62-63). The result was few vacancies in schools with high percentages of non-minority students. The paucity of vacancies in schools with high percentages of non-minority students is indicated in the letter to HEW's Dr. Goldberg, dated January 17, 1978, from the Board (C.A. App. 789, 791) (with charts attached). Thirteen high schools there referred to were all schools with less than 40% minority enrollment (*see*

* Minority teachers totaled less than 9% of all high school teachers during the 1975-76 school year. (App. 91; Pet. App. 13; 584 F.2d at 585).

Pet. App. 14-15; 584 F.2d at 583, n.25). And in the case of all of these schools, for the period from June, 1975 on, undoubtedly due to the onset of the City's fiscal crisis in 1975, only relatively few vacancies are indicated (C.A. App. 790), while, correspondingly, in the 1975-1976 period extensive excessing at these schols is indicated (*id.*). Also relied upon was the Court ordered consent decree in *Aspira of New York v. Board of Education*, 65 F.R.D. 541 (S.D. N.Y. 1974). *Aspira* resulted in a large percentage of the relatively small number of Hispanic teachers being concentrated in schools with high percentages of Hispanic children. (App. 121-123; Pet. App. 54, 63-64). Further, as noted by the District Court (Pet. App. 53, 63), the pool of eligible minority teachers tends to concentrate in vocational rather than academic license areas. Thus, as a practical matter, it must be expected that the vocational schools, which have high percentages of minority students, would have higher concentrations of minority staff. These factors all provide the historical backdrop for HEW's statistical findings and all are neutral, noninvidious justifications for the disparate statistics.* *See also, supra,* pp. 10-12.

In a wide variety of factual contexts where racially disparate impact or effect was concededly present (*i.e.*,

* District Judge Weinstein in acknowledging the positive efforts of the Board toward increasing the percentage of minority staff stated:

> An irony of this litigation is that among the circumstances that now serve to block ESAA funding is the more than two-fold increase in minority teachers in the school system between 1969 and 1976. * * * [HEW] approves the resultant growth in the proportion of minority teachers but not their assignment to predominantly minority schools.

(Pet. App. 61). The percentage of minority teachers in the New York City School System rose from approximately 7% in 1969 to approximately 15% in 1976 (C.A. App. 60).

school segregation (*Keyes* and *Dayton*), employment examinations (*Washington v. Davis*), housing (*Arlington Heights*)), this Court has taken cognizance of the fact that statistics alone do not suffice to establish unconstitutional discrimination. *See also, Jefferson v. Hackney,* 406 U.S. 535 (1972) (involving Aid for Families with Dependent Children). As this Court has noted, "[i]n many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity of the Nation's population.'" *Arlington Heights, supra,* 429 U.S., at 266, note 15, *quoting Jefferson v. Hackney, supra,* 406 U.S. at 548.

By the same token, for the Board to concede in this case the statistical disparities in school staffing seized upon by HEW is merely to acknowledge the heterogeneity of the employee pool from which teachers are drawn and the variety of neutral, non-invidious factors which affect their being assigned to particular schools. This disparity, in fact, proves nothing once these other factors are considered. Analysis of the data and justifications presented by the Board to HEW at the administrative level for the statistical disparity in teacher assignments establishes that under the test of purposeful discrimination set forth in *Arlington Heights, et al.,* HEW could not make a finding of unlawful discrimination (C.A. App. 498-507).

(3)

In alleging that the Board's teacher assignment policies constitute a *prima facie* case of intentional discrimination, HEW also relied upon language in *Swann v. Charlotte Mecklenburg,* 402 U.S. 1 (1971), that a *prima facie* equal protection violation exists "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff * * *" *Id.*

at 18 (App. 108-109).* The Board respectfully submits that HEW's application of this language from *Swann* to conditions in the City of New York is entirely disingenuous. *Swann* concerned the permissible scope of desegregation activities in the state enforced dual school systems of the South. *Id.* at 5-6. *Swann's* language with respect to establishing a *prima facie* constitutional violation on the basis of disproportionate racial composition of teaching and other staff was limited to defining what aspects of a dual school system are constitutionally susceptible to remedial actions. *Id.* at 18. It was not intended to affect the standards for determining discrimination in school systems like that in New York City which have never been found to be dual systems either as a result of state law or as a result of intentional official action. Indeed, in *Keyes v. School District No. 1,* 413 U.S. 189 (1973), this Court interpreted *Swann's* statement that disproportionate racial composition of staff will establish a *prima facie* equal protection violation as being relevant only where a school system has a "history of segregation." *Id.* at 210. A system with a "history of segregation" was defined as a "• • • statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated" *Id.*

Clearly, the school system of the City of New York does not fit into *Keyes'* definition of a system with a "history of segregation." There has never been an administrative or judicial finding that a "meaningful portion" of New York City public schools are "intentionally segregated." It was inappropriate, therefore, for HEW to apply *Swann's* equal protection analysis to the case at bar.*

Furthermore, *Keyes* strongly suggests that under *Swann* the shifting of the burden to the school systems with a "history of segregation" where there is a disproportionate racial composition of teaching staff is appropriate only where the disproportionate composition is due to disproportionate "discharge"—not assignment—of black teachers:

> In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated. Thus, in *Swann,* 402 U.S. at 18, we observed that in a system with a "history of segregation", "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." Again, in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation "thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence."

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* *See also,* Defendant-Appellees' Brief to Second Circuit at 48-49; Memorandum for the Respondents in Opposition to Petition for a Writ of Certiorari at 5, n. 3.

* *Keyes* held that *Swann's prima facie* equal protection analysis was applicable in schools with a "history of segregation" because

> [T]he existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts.

Keyes, supra, 413 U.S. at 210.

Id. at 209, *citing Chambers v. Hendersonville City Board of Education,* 364 F.2d 189, 192 (4th Cir. 1966) (*en banc*) (citations omitted).

Keyes' analysis of *Swann* leads to the inescapable conclusion that it was impermissible for HEW to conclude that the Board's teacher assignment policies constitute a *prima facie* equal protection violation due to the racially disproportionate composition of the teaching staffs at some schools. HEW's inappropriate use of the disparate impact test and its failure to have established constitutionally proscribed intentional discrimination on the part of the Board mandates that its finding of ineligibility should be set aside. *See, Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415-417 (1971).

Throughout the entire history of this controversy between HEW and the Board of Education of the City of New York, HEW has endeavored, by a strained reading of ESAA and prior decisions of this Court, to deprive the students being educated in the New York City public schools of Federal assistance to which they are clearly entitled under ESAA. HEW has done this despite what we have demonstrated was the intent of Congress in enacting ESAA. This case presents the opportunity to point out to HEW that it does not have a commission, no matter how benign its motives, to displace Congress as lawmaker.

The Board of Education of the City of New York has, voluntarily, attempted to combat the effects of past, and present, *de facto* segregation of the races. *See, Parents Association of Andrew Jackson High School v. Ambach, supra,* slip op. at 2225 (2d Cir., April 17, 1979); *see also,* App. 78. In a complex area in which a host of historical and sociological considerations have to be taken into account, there are no simple, uncomplicated solutions. HEW's

narrow and rigid approach in this case ignores social and historical as well as legal realities, and in the process visits injustice upon the students who are in the charge of this school board.

CONCLUSION

The judgment of the Court of Appeals should be reversed and this case remanded to the District Court with a direction to enter judgment declaring that HEW's finding of ineligibility was improper and directing HEW to dispense the withheld ESAA funds to the Board.

May 11, 1979

Respectfully submitted,

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APPENDIX

HOUSE

HR 17846

5/27/70—
HR 17846 (ESAA of 1970) introduced in the House by Rep. Rooney.

6/8/70—
HR 17846 referred to House Committee on Education and Labor for consideration.

HR 19446

9/24/70—
HR 19446 introduced by Rep. Bow and sent to the House Committee on Education and Labor.

11/30/70—
Committee on Education and Labor reported out HR 19446 to the full house.

12/15/70—
House met on HR 19446 as a committee of the whole.

12/21/70—
HR 19446 was passed by the House.

SENATE

S 3883

5/20/70—
S 3883 was introduced into the Senate by Senators Javits and Pell and referred to Senate Committee on Education and Social Welfare.

6/9/70 to
8/27/70—
S 3883 was considered in Committee but never reported out.

HR 19446

12/22/70—
HR 19446 was sent to the Senate by the House one day after the House passed this bill. The House sent HR 19446 realizing that the Senate had not reported its own ESAA bill (S 3883) out of committee.

12/28/70 to
12/31/70—
The House deliberated on HR 19446. No action taken by the House on HR 19446 or on S3883.

APPENDIX

HOUSE

HR 2266

1/26/71—
HR 2266 represented HR 19446 (1970) in substantially similar content. It was introduced by Rep. Bell and referred to the House Committee on Education and Labor.

11/1/71—
HR 2266 as a consolidation of all other related bills referred to Committee was reported out to a Committee of the House on the whole. HR 2266 was defeated by the House.

11/3/71—
HR 2266 was reintroduced into the House as part XXI of HR 7248, the Higher Education Act.

11/4/71—
HR 7248 with ESAA of 1971 as part XXI of the Higher Education Act was passed by the House.

HR 5596

3/4/71—
HR 5596, an alternate version of ESAA of 1971 was introduced by Rep. Fascell and referred to the House Committee on Education and Labor.

HR 10338

8/3/71—
HR 10338, an alternate revision of ESAA of 1971 was introduced by Rep. William F. Ford and referred to the House Committee on Education and Labor.

SENATE

S 1557

4/15/71—
S 1557 (ESAA of 1971) was introduced into the Senate by Sen. Pell.

4/21/71—
Sen. Ribicoff's amendment proposed and rejected by the Senate.

4/22/71—
Sen. Stennis amendment proposed and passed by the Senate.

4/26/71
S 1557 passed by the Senate.

92nd Cong. 2nd Sess. (1972)

118 Cong. Rec.

HOUSE	SENATE
S 659	S 659
	2/22/72—S 659, ESAA of 1972, was introduced as an amendment to the Higher Education Act of 1965. Included in S 659 were both the House version (HR 2266) and Senate version (S 1557) of ESAA of 1971.
	3/ 8/72—S 659 sent out to Conference Committee of the House and Senate.
	5/22/72—Conference Committee reported out S 659 to the Senate.
5/22/72—Conference Committee reported out S 659 to the House.	
	5/24/72—Senate approved Conference report.
6/ 8/72—House approved Conference report.	
6/12/72—S 659 signed by Speaker of the House.	6/12/72—S 659 signed by President Pro Tempore of the Senate.
	6/12/72—S 659 presented to President Nixon for signature.
	6/23/72—S 659 signed into law by President Nixon as the Emergency School Aid Act of 1972.

No. 78-873

In the Supreme Court of the United States

OCTOBER TERM, 1978

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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INDEX

CITATIONS

297-435—79——1

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Whether the Emergency School Aid Act authorizes the Department of Health, Education, and Welfare to withhold the special funds provided under that statutory program from a school district whose faculty assignment policies have a disparate racial impact not justified by educational needs, without a showing that they violate the Equal Protection Clause.

STATEMENT

1. The Emergency School Aid Act, 20 U.S.C. 1601–1619,[1] invites local educational agencies to compete for the limited funds appropriated each year "to meet the special needs incident to the elimination of minority group segregation." 20 U.S.C. 1601(b)(1). Applications are reviewed by HEW's Office of Education and are ranked according to criteria set out in the statute, 20 U.S.C. 1609(c), as implemented by HEW's regulations, 45 C.F.R. 185.14. The essential first step is a determination (20 U.S.C. 1605(d)(4)) that the applicant is not ineligible by reason of the requirements of 20 U.S.C. 1605(d)(1) (Pet. Br. 4–6). Such determinations are made initially by HEW's Office for Civil Rights in accordance with the statute and applicable regulations, 45 C.F.R. 185.01 *et seq.*, especially 45 C.F.R. 185.11 and 185.41–185.45. The burden is on the applicant to establish its eligibility.[2]

[1] By Title VI of the Education Amendments Act of November 1, 1978, Pub. L. No. 95-561, ESAA was re-enacted with amendments immaterial here and recodified at 20 U.S.C. 3191–3207. Because they govern this case, we refer throughout to the textual provisions as they stood before November 1978, and, following the opinions below and Petitioners' Brief, we cite the old Code sections.

[2] A school district found to be ineligible may apply for a waiver of ineligibility. The waiver provision of the statute authorizes the Secretary to permit funding of otherwise ineligible applicants, if the applicant submits such information and assurances as the Secretary may require (20 U.S.C. 1605(d)(1))—

> in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include[s] such provisions as are necessary to insure that such activities do not reoccur after the submission of the application.

The waiver provision is not involved here. Subsequent proceedings provoked by HEW's denial of a waiver to petitioner Board are presently pending on appeal before the Court of Appeals for the Second Circuit. See Pet. Br. 21 n.*.

2. Petitioner[3] filed three applications for ESSA assistance for fiscal year 1977 (A. 57). Petitioner's Basic Grant Application,[4] which is at issue here, was revised to meet minimum program standards and obtained a sufficient ranking to be considered for funding in the amount of $3,559,132 (A. 56–58). However, on July 1, 1977, HEW informed petitioner that it failed to meet the eligibility requirements of the statute (A. 27–41).

After an informal meeting on July 22, 1977, at which the board was given an opportunity to show cause why the ineligibility determination should be revoked, HEW withdrew some of its allegations (A. 60). HEW concluded, however, that the board had not demonstrated a sufficient basis for revocation of the finding that the school district was ineligible under 45 C.F.R. 185.43(b)(2) as a result of "the assignment of full-time classroom teachers to [its] schools * * * in such a manner as to identify [one or more] of such schools as intended for students of a particular race, color, or national origin."

The July 1, 1977 letter discussed in detail the statistical evidence from which HEW concluded that it was possible to identify a large number of schools as intended for either minority or nonminority students, based solely upon the composition of the teaching staffs. That evidence showed that in the New York

[3] We use the singular throughout to denote the central New York City School Board, the only applicant whose request for ESAA funds is still contested. See Pet. Br. 8 n.**. The Chancellor of the City School District is a nominal co-petitioner.

[4] One application failed to meet the minimum program standards set out in the regulations, 45 C.F.R. 185.24 (A. 57). A second, proposing a bilingual project, could not be funded because available funds were exhausted before petitioner's application was reached according to rank order (*ibid.*).

City school district during the 1975–76 school year, 62.6 percent of the high school students were minority students, while 8.3 percent of the high school teachers were members of minorities (A. 42). However, 70 percent of these minority high school teachers were assigned to schools in which the minority student enrollment exceeded 76 percent (A. 29). Conversely, in high schools in which the minority student enrollments were below 40 percent, there was a disproportionately low percentage of minority teachers (A. 42–43).

In the junior high schools and elementary schools,[5] the pattern was the same. The percentage of minority junior high school teachers was 16.7 percent. These minority teachers were concentrated in the community school districts with the highest percentages of minority students (A. 29). At the elementary level, the city-wide percentage of minority teachers was 14.3 percent. Those minority elementary teachers similarly were employed primarily in the community school districts with the largest minority student enrollments (A. 28–29).

In addition to this statistical evidence of racial identifiability of teacher assignments, HEW also relied upon its prior findings that petitioner was in violation

[5] Prior to 1969 when a decentralization law became effective in New York City, assignments of teachers for all schools were made by the Chancellor of the City School District (A. 80). Following decentralization, initial authority for appointment and assignment of teachers to elementary and junior high schools was given to 32 Community School Boards, subject to the powers retained by the Chancellor (A. 81). Because the Chancellor retained ultimate authority over assignments to all schools, Educ. L. 2590-e(2), HEW relied for its findings of ineligibility on the racially identifiable assignment of faculty at the elementary and junior high school levels, as well as the high school assignments which were under the direct control of petitioners (A. 28–30).

of Title VI of the Civil Rights Act of 1964, as set out in its November 9, 1976 letter (A. 7–18) to Chancellor Irving Anker (A. 30):

> In summary, your policies, practices, and procedures, which have been discussed at great length in the aforementioned November letter and have permitted these patterns [of assignment] to develop, have resulted in discrimination on the basis of race, color or national origin in the recruiting, hiring, and assignment of minority teachers, assistant principals, and principals.[6]

The "policies, practices, and procedures" discussed in the November letter included hiring and selection procedures which limited the opportunity for minority teachers to be assigned to the high schools and special schools and to elementary and junior high schools in which the reading level of students was greater than 45 percent of the city-wide average (A. 9–12).[7]

3. Shortly after notification by HEW that the finding of ineligibility would not be withdrawn, petitioner filed this action challenging the denial of ESAA assistance. The complaint did not challenge the accuracy or sufficiency of HEW's statistics showing the racial identifiability of its teacher assignments (A. 129–149).

[6] The issue of assignment of principals and assistant principals was not finally resolved by the district court and is therefore not at issue here.

[7] In 1969, state law governing appointment and assignment of teachers was amended to allow an alternative hiring method for teachers in elementary and junior high schools where the reading level of students is below the 45 percentile of the reading scores for the entire district (A. 80). This method resulted in the hiring of a greater number of minority teachers for the "45 percentile schools"—a stated purpose of the legislation (A. 82). Since the 45 percentile schools were themselves predominantly minority schools, the result was the disproportionate assignment of minority teachers to minority schools (A. 12).

Instead, petitioner took the position that the racially identifiable assignments resulted from the requirements of state law, the provisions of their collective bargaining agreement, licensing requirements for particular teaching positions, the provisions of a federal court consent decree concerning bilingual instruction,[8] and demographic changes in student population; intentional or purposeful discrimination was denied (A. 134–139).

Initially, the district court, after reviewing the administrative record, upheld HEW's determination of ineligibility as having a reasonable basis. Concerning petitioner's explanations for the substantial statistical disparities in teacher assignments, the court stated (A. 69–70):

> In this respect, considering the high school statistics, the State statutes, the United Federation of Teachers agreements, the wishes of individual Black principals, the desires of the individual Parent-Teachers Associations, community school board and Black and White communities, the Administrator could find a practice, policy or procedure after June 23, 1972, resulting in the identification of schools as intended for students of a particular race, color or national origin through the assignment of teachers to those schools.

However, after a hearing on the petitioner's motion for reargument, the court concluded that HEW had not in fact considered the school board's proffered justifications to be relevant to a determination of ineligibility under the regulation (A. 103–104). The court therefore remanded the matter to HEW for further consideration consistent with its opinion (A. 107).[9]

[8] *Aspira of New York, Inc.* v. *Board of Education*, 72 Civ. 2004 (S.D.N.Y. Aug. 29, 1974).

Following the administrative hearing held on remand, HEW notified petitioner that its explanations for the racially identifiable staffing pattern did not adequately rebut the *prima facie* evidence of discrimination shown by the statistics (A. 107). HEW's letter of March 22, 1978, to the Chancellor of the City School District discussed each of the justifications offered by the school district and demonstrated why each was insufficient (A. 111–114).

Petitioner again sought review of HEW's denial of ESAA funding in the district court. On April 18, 1978, that court entered its judgment finding that HEW's determination that petitioner was ineligible for ESAA funding was supported by substantial evidence (A. 150–153). The court of appeals affirmed the judgment of the district court dismissing petitioners' complaint. Noting that "[i]rrespective of how the teachers are appointed, ultimate control still remains with [petitioners]" (Pet. App. 12), the court demonstrated that at all levels, high school, junior high school, and elementary school, there was a correlation between the racial/ethnic composition of the faculty and the racial composition of the student bodies (Pet. App. 13–15). In the court of appeals, petitioner did not contest the finding that its schools were racially identifiable "as a result of the significant disparities in staff assignments" (Pet. App. 18). Rather, petitioner maintained,

[9] The district court required HEW to find either an illegally segregated faculty prior to June 23, 1972, which was not thereafter desegregated, or a practice after that date which was segregative in intent, design, or foreseeable effect (A. 103–104). The court stated that "the Constitution mandates that the plaintiffs must have an opportunity to rebut a statistical *prima facie* case of discrimination" (A. 104).

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as it does here, that HEW was required "to establish that the disparities resulted from purposeful or intentional discrimination in the constitutional sense" (Pet. App. 18-19). The court of appeals rejected this contention and did not address the question whether purposeful discrimination had been demonstrated. The court found that Congress had the authority (Pet. App. 23–24 & n. 38), and "* * * intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an *unjustified* disparity in staff assignment" (Pet. App. 25; emphasis added).

The court of appeals fully considered petitioner's asserted justification for the disparate effect of its conduct and concluded that HEW's denial of funding was not arbitrary or capricious and that the available data "clearly support[ed] HEW's determination" (Pet. App. 26). The court held (Pet. App. 26–27):

> [t]he proffered justifications * * * (1) restrictions on the transfer of teachers written into the collective bargaining agreement, (2) the desirability of teaching assignments in those schools, (3) the unwillingness of many non-minority teachers to teach in predominantly minority schools and (4) the unequal distribution of licenses in specific areas.

were either inadequate as a matter of law or were unsupported by the facts. Specifically, the court found that (Pet. App. 27):

> [t]he unequal distribution of licenses resulted from the very examinations which [HEW] previously determined had produced a racially significant disparate impact [and which had not been found to be job-related (A. 104)]. Leaving aside whether the remaining justifications are sufficient as a matter of law, they have not been supported by adduced facts appearing on the record.

Petitioner's request for rehearing was denied on October 6, 1978. On October 31, 1978, the court of appeals granted petitioner's motion for a stay of mandate preserving the ESAA funds pending application to this Court for a writ of certiorari. On February 21, 1979, this Court granted a writ of certiorari, thereby continuing in effect the stay issued by the court of appeals. See Rule 41(b), Fed. R. App. P.

ARGUMENT

INTRODUCTION AND SUMMARY

1. The present case has a complex history and might furnish a pretext for elaborate discussion of a number of issues. Thus, because, on remand, the Department of Health, Education, and Welfare found that petitioner's teacher assignment policies were unconstitutional and the district court affirmed, we might debate the correctness of that finding on the administrative record. But the court of appeals expressly avoided that question and, in that posture, it seems to us inappropriate to argue it here.[10] So, also, we eschew persuing the dictum of the court of appeals to the effect that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, condemns practices having a disparate racial impact although no purposeful discrimination is shown. That brief aside is no part of

[10] So saying, we of course do not abandon the administrative finding, affirmed by the district court, that petitioner's faculty assignment policies violated the Equal Protection Clause. On the contrary, in our view, the statistical evidence (see pages 3–4, *supra*; Pet. App. 13–19 & nn.24–32) makes out a *prima facie* case of purposeful discrimination which was not effectively rebutted. But the correctness of that ruling will only become an issue if this Court should remand the case to the court of appeals for further proceedings.

the decision which this Court has undertaken to review.

Nor is it necessary here to define with precision the scope of the so-called "disparate impact" test. It is common ground that the regulation applied by HEW does not require a finding that the school system declared ineligible has acted with a purpose or intent or motive to discriminate on a racial basis. There is no equivocation: under the regulation, a school board is ineligible for ESAA funds if it has assigned full-time teachers to schools "in such a manner as to identify any of such schools as intended for students of a particular race, color or national origin." 45 C.F.R. 185.43(b)(2). That is an objective criterion and petitioner does not here challenge the finding that its policies have produced this disqualifying result. And, finally, there is no contention made that the conceded "disparate staffing patern" (Pet. Br. 60) was unavoidable. As we understand petitioner (Br. 55–67), its argument here is *not* that HEW or the courts below erroneously rejected proferred explanations or justifications for the disparate assignments, but, rather, that no finding that the pattern resulted from "intentional [or] purposeful discrimination" properly could be made on this record (Br. 55). In sum, unless the constitutional standard applies, it is effectively conceded that petitioner was permissibly denied ESAA funds.

There is, of course, no contention that, for the limited purpose of providing additional funding to educational agencies, Congress was not free to define eligibility more restrictively than the Equal Protection Clause requires. The issue is whether it intended to do so. Thus, in this Court, a single question is presented: Does the Emergency School Aid Act authorize the

withholding of the special funds thereby provided from a school board whose faculty assignment policies have a disparate racial impact, when those policies, although not shown to amount to purposeful racial discrimination in violation of the Equal Protection Clause, are not justified by educational needs. If, as the court of appeals held, an affirmative answer should be given, the case is at an end.

2. In our submission, the ruling of the court of appeals is fully supported by the text of the statute and its legislative history.

Although the immediately controlling words are ambiguous, their meaning is made plain when related provisions are examined. The other texts defining ineligibility establish a general objective approach, which focusses on effect rather than purpose. And the same emphasis is revealed in the statutory declaration of policy, which commands uniform rules in applying the Act to deal with "conditions of segregation," expressly "without regard to the origin or cause of such segregation."

The legislative history confirms the view that Congress intended the ESAA program to be governed by a disparate impact standard. The object of the so-called "Stennis Amendment," now 20 U.S.C. 602, was to treat *de facto* and *de jure* segregation alike in respect of the Federal funds to be provided. Thus, it was understood that present activities, not historic causes, would determine implementation.

This, indeed, is the only approach that accords with the congressional concern with racial isolation, regardless whether it was the product of intentionally discriminatory school policies or resulted more "accidentally." To remedy racial isolation that could be traced to no constitutional violation, the statute sought to encourage voluntary action by offering a financial

reward. Obviously, that required withholding funds even in the absence of judicially actionable default.

ELIGIBILITY FOR FUNDS UNDER THE EMERGENCY SCHOOL AID ACT IS DETERMINED BY A DISPARATE IMPACT STANDARD

The New York City School Board was denied funds under the Emergency School Aid Act because its faculty assignment policy was determined to violate the applicable regulation, which declares ineligible an educational agency whose full-time teachers are assigned in such a way as to identify schools as "intended for students of a particular race, color, or national origin," whether or not that result is the product of purposeful discrimination. 45 C.F.R. 185.43(b)(2).[11] As we have said, the question thus presented is whether such a rule is consistent with the statute.

1. The statutory words that govern this case, stripped of all context, are these from Section 1605 (d)(1) of the Act (Pet. Br. 4–5):

> No educational agency shall be eligible for assistance under [ESAA] if it has, after June 23, 1972–
>
> * * * * *

[11] The cited regulation provides:

"No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility), including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin."

> (B) * * * engaged in discrimination based on race, color, or national origin in the hiring, promotion, or assignment of employees of the agency * * *.[11a]

[11a] The subsection in full is as follows:

"(d) Ineligibility for transfer of property to segregated facility; waiver of ineligibility

"(1) No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—

"(A) transferred (directly or indirectly by gift, lease, loan, sale, or other means) real or personal property to, or made any services available to, any transferee which it knew or reasonably should have known to be a nonpublic school or school system (or any organization controlling, or intending to establish, such a school or school system) without prior determination that such nonpublic school or school system (i) is not operated on a racially segregated basis as an alternative for children seeking to avoid attendance in desegregated public schools, and (ii) does not otherwise practice, or permit to be practiced, discrimination on the basis of race, color, or national origin in the operation of any school activity;

"(B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency (or other personnel for whom the agency has any administrative responsibility);

"(C) in conjunction with desegregation or the conduct of an activity described in this section, had in effect any procedure for the assignment of children to or within classes which results in the separation of minority group from nonminority group children for a substantial portion of the school day, except that this clause does not prohibit the use of bona fide ability grouping by a local educational agency as a standard pedagogical practice; or

"(D) had in effect any other practice, policy, or procedure, such as limiting curricular or extracurricula activities (or participatiorn therein by children) in order to avoid the participation of minority group children in such activities, which discriminates among children on the basis of race, color, or national origin;

Standing alone, this provision is indeed ambiguous. Congress might be declaring ineligible for ESAA funds only school districts that have violated the Equal Protection Clause since mid-1972, or, with equal plausability, the term "discrimination" might—here, as in Title VII of the Civil Rights Act of 1964—intend also to embrace practices that have a disparate racial effect, even though no discriminatory purpose is shown. But, fortunately, we are not confined to these bare words: There is a history and a context to guide us.

2. The most obvious first step is to look at the remainder of the immediate text that governs our case. Subsection (B) of Section 1605(d)(1) (note 11a, *supra*) begins by declaring ineligible a school district that "had in effect any practice, policy, or procedure *which results* in the disproportionate demotion or dismissal of instructional or other personnel from minority groups" (emphasis added). As petitioner necessarily concedes (Br. 25), here Congress has unequivocally enacted an objective, "impact" test, and one would expect a like standard to apply to promotion, hiring and assignment of teachers and other employees.

In the absence of any clear indication to the contrary, this alone suggests that "discrimination" in Subsection (B) reaches all personnel actions having

except that, in the case of any local educational agency which is ineligible for assistance by reason of clause (A), (B), (C), or (D), such agency may make application for a waiver of ineligibility, which application shall specify the reason for its ineligibility, contain such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission of the application."

a discriminatory effect. Certainly, the phrase "engaged in discrimination" does not foreclose this reading. Indeed, the full phrase is "*otherwise* engaged in discrimination," thereby obviously characterizing as "discriminatory" the demotion and dismissal actions just noticed which merely have a disparate impact on minorities. Presumptively, then, assignment practices that have a like effect are equally condemned as "discrimination," regardless of purpose.

3. Although it would be odd, one can conceive of a statute that viewed disparate effect as sufficient to condemn demotion and dismissal practices but required proof of evil purpose in all other cases. That, however, is not our Act. When we go beyond Subsection (B) and notice the other grounds of ineligibility under ESAA, it is immediately apparent that an effect test is the general rule, not the exception.

Thus, Subsection (A) of Section 1605(d)(1) (note 11a, *supra*) disqualifies an educational agency that transfers property or makes services available to a private school system without first determining that the recipient does not practice discrimination. Here, plainly, eligibility requires more than absence of an invidious motive. The applicant for ESAA funds is barred even when it is merely negligent in failing to discover the character of the recipient, or when its purpose is purely financial rather than discriminatory.

So, also, in Subsection (C) of the same Section, which deals with the assignment of students to particular classes, or class sections or "tracks," within a school. To be sure, in this instance, the law expressly condones separation of a minority group if it is the consequence of "bona fide ability grouping." But, with only this exception, "any procedure * * * *which re-*

sults in the separation of minority group children for a substantial portion of the school day" is condemned, regardless of purpose.

The only exception to this pattern is an example included in Subsection (D): "limiting curricular or extra curricular activities (or participation therein by children) *in order to* avoid the participation of minority group children in such activities." But this unusual case hardly establishes the rule. On the contrary, here, we can readily appreciate that a mere effect test would be wholly out of place: it would automatically condemn every decision not to offer a particular course or program, however benign or however dictated by budgetary exigencies.

The evidence from parallel provisions, then, is very clear that, for the limited purposes of ESAA, Congress was determined to avoid financial support of practices that effectively perpetuated discrimination, whether or not so intended.

4. The same conclusion is indicated when we go beyond Section 1605 and examine the statutory declaration of policy which prefaces the Act. First, we notice the express congressional concern with "minority group isolation" and the purpose to encourage its elimination. 20 U.S.C. 1601.[12] The focus is on the adverse *effect* of that situation, not the cause.

[12] The full text of Section 1601 is as follows:

"(a) The Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access.

"(b) The purpose of this chapter is to provide financial assistance—

"(1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;

This is made even plainer in Section 1602(a).[13] Here, Congress declares it to be "the policy of the United States" that ESAA shall be implemented "uniformly in all regions of the United States in dealing with *conditions of segregation* by race." The italicized phrase is obviously chosen to reach *de facto* situations, regardless of fault. But even this is not left to inference: the provision expressly continues: *"without regard to the origin or cause of such segregation."* Since all "guidelines and criteria," presumably including those governing eligibility, must be "uniformly applied" regardless of "origin or cause," it must follow that they should look to effect, not purpose.

5. Not surprisingly, the legislative history of the statute is entirely consistent with our reading of the text. What is most relevant are the debates surrounding the so-called "Stennis Amendment," now Section 602(a), *supra.*

The idea of a uniform standard, applicable North and South, was proposed by Senator Stennis in April 1971 in the debate on proposed legislation known as the "Emergency School Aid and Quality Integrated Education Act of 1971." The proponents of the amendment argued that Southern school districts were being

"(2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and

"(3) to aid school children in overcoming the educational disadvantages of minority group isolation.

[13] Section 1602(a) provides:

"It is the policy of the United States that guidelines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation."

required to desegregate their schools in order to receive emergency school assistance, while school districts in other areas of the country could continue to receive federal assistance in spite of existing conditions of segregation. As Senator Eastland put the matter (117 Cong. Rec. 11511 (1971)):

> The Stennis amendment would provide that there be a national school policy applied equally to all States, localities, regions, and sections of the United States. The adoption of this amendment would help to eliminate the use of the "double standard," which has resulted in the requirements for the integration of the public schools being given a very stringent application in the South and a very lenient application elsewhere.

And again (*id.* at 11512):

> I have never been able to understand how a 10-year-old colored student in a public school in Harlem, Watts, or South Chicago, is expected to look around and see nothing but black faces in his classroom and say to himself: "This kind of racial separation does not hurt me because the State of Illinois does not have a law requiring me to attend all-black schools. I should not feel hurt by this racial separation because it is the result of housing patterns that just accidentally developed.

The opponents of the amendment were concerned only that it not be read as cutting back desegregation efforts in those states which had segregated their schools by law. See, *e.g.*, 117 Cong. Rec. 11517 (1971) (remarks of Senator Mondale). As petitioners correctly point out (Br. 39), the opposition centered more on the portions of the amendment which applied to Title VI and the Elementary and Secondary Education Amendments of 1966 than to ESAA itself. For instance, Senator Javits remarked (*ibid.*):

> * * * If the Senator from Mississippi would confine his amendment to this act, where we have a quite different purpose in mind, I would look at it with much more sympathy, but if it is intended to make prosecutions of violations of the law more difficult, I would oppose it. * * *

The "quite different purpose" of ESAA to which Senator Javits was referring was "to combat all types of segregation, whether de facto—racial isolation—or de jure." *Ibid.*

The Stennis amendment was adopted on April 22, 1971, 117 Cong. Rec. 11520, and was included in the final version of ESAA when it was passed as Title VII of the Education Amendments of 1972, Pub. L. No. 92–318, 86 Stat. 235 *et seq.*[14] As Senator Stennis himself summarized his proposal in the final debate of May 1972 (118 Cong. Rec. 18844 (1978)):

> For the first time, if this conference report is adopted and the bill is signed into law, we will have a uniform national policy in school desegregation matters, North, South, East and West applied uniformly without regard to the origin or cause of such segregation. That is the Stennis amendment, pure and simple.

In sum, the legislatively history of Section 1602(a) tells us that the provision means what it says: that, so far as ESAA is concerned, the same standard should govern nationwide, to *de facto* segregation as to *de jure* segregation—which strongly suggests, if indeed it does not mandate, eligibility rules that focus on actualities, not history—on consequences, not intent.

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[14] See H.R. Rep. No. 92–1085, 92d Cong., 2d Sess. 212–213 (1972), explaining the treatment of the House and Senate versions of this provision when the bill went to conference.

6. Finally, our conclusion is confirmed by a consideration of the general scheme of this limited statutory program, viewed in the light of the prevailing wisdom when it was enacted. Indeed, there is no disagreement as to the philosophy underlying the Act.

Petitioner correctly points out that those who wrote ESAA recognized that racial isolation, whatever the cause, was harmful to the children involed and ought to be alleviated, if possible (Pet. Br. 32–33). But it was generally believed that the courts, implementing the Constitution, could not reach "*de facto* segregation" (*id.* at 28–30). Nor was the Congress itself minded to *mandate* a change in the status quo (*id.* at 22–23). And so, the solution adopted was to employ the "carrot" approach "to encourage the voluntary elimination, reduction, or prevention of minority group isolation." 20 U.S.C. 1601(b)(2).

It seems evident that, with such a starting point, it would make no sense to grant funds to school districts that, although not violating the Constitution, were maintaining a segregated system. To treat as ineligible only applicants with a guilty past or a conscious present intent to perpetuate racial isolation would defeat the objective of ending segregation, *de facto* as well as *de jure*. To accomplish its full goal, the program must withhold funds from all agencies doing less than reasonably might be expected to reduce racial isolation, whatever its cause. In our submission, that is precisely what Congress intended, and the Secretary has faithfully heeded the legislative directive.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1979.

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FOR ARGUMENT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
No. 78-873

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

PATRICIA ROBERTS HARRIS, Secretary, Department of Health, Education and Welfare, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

HEW restricts its argument in its brief to what it contends is the meaning of the expression "engages in discrimina-

tion" in Section 1605 (d)(1)(B).*

Accordingly, we limit our reply to that issue, relying on the Board's main brief

*20 U.S.C. §1605 (d)(I)(B) provides:

> No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972 -
>
> (B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency (or other personnel for whom the agency has any administrative responsibility).

with respect to the other issues here presented.*

HEW states that its reading of this part of the ESAA legislation is "fully supported by the text of the statute and its legislative history" (Resp. Br. 11). HEW is incorrect on both points. Its reading of the statute overall is strained and contrary to the common meaning of the

*We will not reply at length to the suggestion in the Lawyers' Committee amicus brief that the petition for certiorari should be dismissed as improvidently granted (Am. Br. 8-10). Suffice it to say, the amicus misunderstands the facts of this case. At issue here is the teacher assignment policy in New York City high schools. The provision of state law (N.Y. Educ. Law §2590-j 5) addressed to increasing minority teaching staff in schools with low reading scores, discussed by the Lawyers' Committee (Am. Br. 9 n. 13), applies only to hiring in primary schools. Hiring in primary schools is under the direction of the Community School Boards and has no relevance to this case. See, N.Y. Educ. Law §2590-j; Pet. Br. 8 (footnote**).

language used. Its references to and quotations from the legislative history are incomplete and ignore the more relevant legislative history cited in our main brief.

1. HEW, as well as the Lawyers' Committee, argue that, because the expression "engages in discrimination" is preceded by the word "otherwise," which in turn is preceded by a test for ineligibility based upon "disproportionate demotion or dismissal" of minority staff members, concededly a test for ineligibility not requiring an intent to discriminate, "discrimination" as here used does not require intent. HEW and the Lawyers' Committee apparently suggest that "otherwise" means "in the same manner as" or "similarly."

In a proper context, e.g., where the doctine of ejusdem generis is applicable, "otherwise" might be so read. See generally, 2A Sutherland, Statutory Construction (4th ed.) § 47.17 et seq. But this is not its ordinary meaning.* And, in the context of this statute, where "otherwise" is not preceded by an enumeration of a number of types of improper conduct (compare id., §47.18), but rather is preceded by a description of a single type of highly particularized conduct, the sense of the statute is not of similarity, but of contrast. I.e.

*The dictionary defines "otherwise" to mean:

> 1. in a different way or manner: differently (he could not act [otherwise]) 2. in different circumstances: under other conditions ([otherwise] he might have won) 3. in other respects (weak but [otherwise] well).

Webster's Third International Dictionary (1961) (Unab.).

Section 1605(d)(1)(B) first prohibits, without regard to intent, disproportionate demotions or dismissals; then in apparent contrast to the first type of conduct, it also prohibits discrimination in the hiring, promotion, or assignment of staff.

Indeed, if it were not the intent of the statute to draw such a distinction, but rather to treat hiring, promotion and assignment in the identical way that demotions and dismissals are treated, the paragraph in question would be both clearer and shorter: it would simply treat these activities together, rendering ineligible any applicant whose practices or policies produced "disproportionate results" in any of these areas.

But it was clearly not the intention of Congress to treat in the

same way demotions and dismissals and questions related to hiring, promotions and assignments. This is indicated not only by the language of the statute, but also by its legislative history. Thus, the Senate Committee on Labor and Public Welfare stated in its report:

> The phrase "disproportionate demotion or dismissal of instructional or other personnel from minority groups" is not modified or in any way diminished by the subsequent phrase "or otherwise engaged in discrimination based upon race, color or national origin," which renders ineligible local educational agencies which have engaged in other discrimination, including discrimination in hiring, against minority group employees.

Sen. Rep. No. 92-61 p. 19, 92d Cong. 1st Sess. (1971) (emphasis added). See also, id. at 41; Pet. Br. 24-27. Here we see not only the firm distinction that Congress intended to be drawn between these two categories of ineligibility,

but, moreover, that the standard applicable where demotions and dismissals are in issue is more burdensome on applicants then the standard applicable to staff assignments.*

2. The next step in HEW's argument is to contend that the "general rule," the "pattern," for determining ineligibility under Section 1605(d)(1) is an effects test (or disparate impact) (Resp. Br. 15-16). HEW's basic premise in making this argument is that paragraphs (A) and (C) of Section 1605(d)(1),

*Congress singled out staff demotions and dismissals as appropriate for a disparate impact standard because of its finding that desegregation activities in the South had resulted in wholesale firing of black staff. See, Sen. Rep. No. 92-61 p. 18, 92d Cong. 1st Sess. (1971); Pet. Br. 26 (footnote). HEW's brief simply ignores this most relevant legislative history. We submit that this Court cannot ignore it; it tells eloquently what Congress had in mind in enacting the special provision for demotions and dismissals.

as well as the first part of paragraph (B), all incorporate an effects test, and thus, notwithstanding paragraph (D), which HEW concedes incorporates an intent test (Resp. Br. 16), the general rule of the statute is to apply an effects test.

Even if we were to accept HEW's assumptions that paragraphs (A) and (C) incorporate this burdensome test, we cannot comprehend how the question over staff assignments is thus resolved in HEW's favor. It is dubious logic indeed to conclude that the existence of an effects test in three out of five categories of ineligibility compels the

conclusion that it also exists in a fourth.*

Moreover, it is clear that paragraph (A) does not incorporate an effects test, and, although as to paragraph (C) the question is somewhat more complex, even here it is clear that effect alone would ordinarily not be enough to justify a finding of ineligibility.

Paragraph (A) was specifically intended by Congress to restrict ESAA eligibility only where transfers of property to private segregated schools are intentional:

*The five categories of ineligibility are: (1) transfers of property to private segregated schools (Section 1605 (d)(1)(A)); (2) disproportionate demotion or dismissal of staff (Section 1605(d)(1)(B)); (3) discriminatory staff assignments (Section 1605(d)(1)(B)); (4) discriminatory classroom assignments (Section 1605(d)(1)(C)); and (5) discrimination against minority children in school activities (Section 1605(d)(1)(D)).

> [I]t would provide that it has to be knowingly made or made with some kind of intent, because that was the purpose of Congress originally.

118 Cong. Rec. 5983, 92d Cong. 2d Sess. (1972) (remarks of Sen. Chiles). The Lawyers' Committee is in accord with the Board in this interpretation of paragraph (A) (see, Am. Br. 33-34).

With respect to paragraph (C), intent to discriminate is, again, at least as a practical matter, the cornerstone of an ineligibility finding. Under ESAP,* desegregation efforts had been frustrated by the creation of bogus ability groupings which were used to segregate students by race within desegregated schools. See, 117 Cong. Rec. 11728, 92d Cong. 1st Sess.

*Emergency School Assistance Program, P.L. 91-38, 84 Stat. 800 (1970), the predecesser to ESAA.

(1977) (remarks of Sen. Mondale). Paragraph (C) in its original form* was specifically addressed to overcoming this problem. As stated by Senator Pell:

> This language in the bill seeks to avoid ability grouping which is used as a guise or cover for segregation.

Id. at 11727. The proposed provision was nonetheless amended by the addition of another phrase* in order to put to rest any question that bona fide ability groupings resulting in segregated classes could trigger ESAA ineligibility. See, id. at 11727, 11178, 11729, 11730 (remarks of Sen. Ervin); id. at 11728, 11729 (remarks of Sen. Byrd); id. at 11730 (remarks of Sen. Mondale).

*Section 5(d)(1) of S. 1557 originally provided:

> No local educational agency shall be eligible for assistance under this act if it has, after the date of enactment of this act --
>
> (C) in conjunction with desegregation or the conduct of activity described in section 5 had in effect any procedure for the assignment of children to or within classes which results in the separation of minority group from non-minority group children for a substantial portion of the school day;

117 Cong. Rec. 11727, 92d Cong. 1st Sess (1971).

*The amendment provided:

> Provided, however, the foregoing does not prohibit the use of bona fide ability grouping by a local educational agency as a standard pedagogical practice; or

117 Cong. Rec. 11730, 92d Cong. 1st Sess. (1971). With the addition of this final phrase, the proposed subsection (C) is identical in pertinent part with the enacted provision.

Thus, under paragraph (C) the issue to be determined in every case involving separation of minority children, except where no justification is offered in terms of ability groupings, is the good faith of the applicant. Conceivably, it might be held that in determining this issue lack of educational justification for the ability grouping could be considered as evidence of bad faith, but still Congress has clearly indicated that the issue here is good faith (i.e., intent), not educational justification.

Contrary to HEW's reading of this statute, the dominant theme of ESAA, based upon its language and legislative history, is that an applicant may not be held ineligible except upon a finding that it engaged in some type of intentional dis-

crimination or conduct calculated to further discrimination.* Although we do not agree with HEW that the "general rule" or "pattern" of Section 1605(d)(1) furnishes a reliable guide to determining what Congress had in mind in using the words "otherwise engages in discrimination," it is enough to note here that HEW's "general rule" argument is manufactured out of whole cloth, and, if anything, supports the Board's reading of these words.

3. With respect to both HEW's and the Lawyers' Committee's reliance upon

*The inclusion of the intent standard throughout Section 1605(d)(1) effectively invalidates the Lawyers' Committee's argument that in order to permit "rapid, objective measurements" of ESAA applications, Congress intended disparate impact to be the general test for ESAA ineligibility (Am. Br. 3-4). Furthermore, we note that HEW has yet to advance this particular justification for applying a disparate impact standard in this case.

the Stennis amendment, we would be most brief. In addition to what we have said on this point in our main brief, we would observe that the undeniable, and even admitted, presence of intent tests in Section 1605(d)(1) simply cannot be squared with the Court of Appeals' and our opponents' view that Section 1602(a) mandates the application of a disparate impact or effects test in determining ESAA eligibility.

Moreover, in terms of the approach here taken by HEW of focusing so closely on the language of ESAA, to the exclusion of other indicia of legislative intent, it is significant that the Stennis amendment never uses the term "discrimination"; rather, it refers to "segregation whether de jure or de facto" (emphasis supplied). This difference is

critical; "discrimination" does not mean the same thing as "segregation whether de jure or de facto." As we pointed out in our main brief (Pet. Br. 27-30), and neither HEW nor the Lawyers' Committee ever really answers this, the Congress which enacted ESAA knew what it meant by the term "discrimination." It meant intentional discrimination in violation of the Equal Protection Clause, not including merely de facto segregation. The policy of the Congress expressed in the Stennis amendment to address the problem of segregation "without regard to [its] origin or cause" (Section 1602(a)), affords no warrant for ignoring the understanding of Congress when it used the term "discrimination" in Section 1605(d)(1)(B). That term in paragraph (B) clearly refers to actionable, de jure conduct. No amount of artful textual

analysis, or ignoring of the relevant legislative history, can alter this fact. This was the understanding and intent of Congress. That understanding and intent should, indeed must, be given effect.

September 3, 1979

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-873

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

v.

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* *

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes former Attorneys General, past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C. and its offices in Jackson,

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* Letters from counsel for the parties consenting to the filing of this Brief have been filed with the Clerk of this Court.

Mississippi and eight other cities, the Lawyers' Committee over the past sixteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in education, employment, voting, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee and its local committees, affiliates, and volunteer lawyers have been actively engaged in providing legal representation to those seeking relief under federal civil rights legislation. That representation has included assistance in school desegregation cases raising issues of faculty assignment similar to those presented here. In addition, the Committee for many years has dealt with various federal agencies, including the Department of Health, Education and Welfare, and, as a result, has knowledge and expertise concerning the legislation which the Department seeks to enforce and the effectiveness of its efforts.

Historically, the Lawyers' Committee has strongly endorsed vigorous action by the Executive and Legislative branches to support school desegregation. We believe that federal grant-in-aid programs like the Emergency School Aid Act (ESAA) which specify conditions of successful, effective integration that must be met if a recipient is to be eligible for funds, are proper and desirable mechanisms to implement the national policy favoring school desegregation. To the extent compliance with such conditions is enforced, that policy will be effectuated.

In 1970 the Lawyers' Committee, with the help of hundreds of volunteer attorneys, worked with other civil rights groups to investigate the operation of the federal desegregation grant scheme which preceded ESAA: the Emergency School Assistance Program (ESAP).[1] That effort documented administrative failure to enforce pro-

[1] P.L. 91-380. *See* pp. 16-20 *infra*.

visions of the ESAP regulations[2] which had been designed, on paper, to insure that school districts receiving funds were meeting desegregation requirements.[3] As we show below, the Congress which enacted ESAA inserted specific conditions of eligibility (including the one which is at issue in this case) into the law so as to avoid a repetition of these difficulties.

The Lawyers' Committee believes that ESAA has proved to be an effective instrument and incentive for school desegregation. That is primarily the case because the law establishes conditions of eligibility for funding which are susceptible to rapid, objective measurement in *pre-grant* reviews of applicants.[4] In accordance with

[2] The ESAP program was proposed by President Richard M. Nixon on May 21, 1970. In order to permit ESAP to go into effect in the Fall of 1970, funds were reallocated under several different education programs. This was accomplished through appropriations legislation, P.L. 91-380, 84 Stat. 800, *reprinted in* [1970] U.S. CODE CONG. & ADM. NEWS 942. Except for prohibitions against the transfer of property or services to discriminating private schools, a nonsupplanting clause, and a maintenance of effort requirement, the only substantive restrictions on the use of funds were accordingly contained in the regulations issued (without prior publication for comment) on August 22, 1970, 35 Fed. Reg. 13442, *reprinted as* 45 C.F.R. Part 181 (1971).

[3] Washington Research Project, et al., THE EMERGENCY SCHOOL ASSISTANCE PROGRAM: AN EVALUATION (1970). *See also*, Washington Research Project, et al., THE STATUS OF SCHOOL DESEGREGATION IN THE SOUTH, 1970 (1970). A less extensive, but officially sponsored, study also documented serious defects in administration of ESAP, including the funding of a district where the pattern of faculty assignments violated the regulations. *See* General Accounting Office, *Need to Improve Policies and Procedures for Approving Grants Under the Emergency School Assistance Program* (1971), *reprinted in Emergency School Aid Act: Hearings on H.R. 2266 Before the General Subcommittee on Education of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 89, 134 (1971).

[4] In 1978 the Congress reauthorized ESAA without modifications material to this case. It did, however, emphasize the desirability of quick completion of eligibility determinations in order to avoid funding delays to school districts ultimately determined by HEW to be

principles of administrative law, the burden of producing information adequate to demonstrate that the eligibility conditions have been satisfied is upon the applicant; the statute has been administered in this manner for seven years.[5]

The interpretation of the statute pressed by Petitioners here, however, would drastically alter this administrative scheme. If HEW may deny an ESAA application only when it can demonstrate an intentional constitutional violation by the applicant, the burden of investigation and presentation of evidence sufficient to prove intent (and thus ineligibility) will have to be borne by agency personnel. There will cease to be any distinction between ineligibility rulings and determinations of Title VI [6] violations which justify withdrawal of all federal funding.[7] For all practical purposes, the *special* ineligibility conditions written into the ESAA statute will cease to exist, and Congress' effort to complement Title VI enforcement through this mechanism will be destroyed. The result will be a diminished level of enforcement activity and a decline in the achievement of equal opportunity in the school systems of the nation.

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eligible. *See* § 610(b) of the Elementary and Secondary Education Act of 1965, as added by § 601(a) of the Education Amendments of 1978, P.L. 95-561, 92 Stat. 2252, 2262, *reprinted in* [1978] U.S. CODE CONG. & ADM. NEWS. *See also, id.* at 5069, 5189.

[5] Because this is the established procedure, the ESAA applicant pre-grant reviews have been tasks of manageable proportions which do not swamp the limited resources of the Office for Civil Rights (OCR), HEW. *See* 44 Fed. Reg. 5204 (Jan. 25, 1979); 43 Fed. Reg. 7048 (Feb. 17, 1978); 42 Fed. Reg. 11154 (Feb. 25, 1977) [annual operating plans].

[6] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

[7] *See Regents* v. *Bakke*, 57 L. Ed. 2d 750, 767-69 (opinion of Powell, J.); *id.* at 793, 795-803, 810 (opinion of Brennan, White, Marshall and Blackmun, JJ.); *id.* at 851 n. 21 and accompanying text (opinion of Stevens, J., Burger, C.J., Stewart and Rehnquist, JJ.) (1978).

The Committee views such possibility with dismay. Because nothing in the ESAA statute or its legislative history supports the interpretation offered by Petitioners, and in light of our longstanding concern about the ESAA program, we file this brief *amicus curiae* for the assistance of the Court.

SUMMARY OF ARGUMENT

Introduction

The only issue which requires decision by this Court is whether § 1605(d)(1)(B) of the Emergency School Aid Act was intended to incorporate constitutional standards in determining the eligibility of school districts to receive funds. Neither the scope of Title VI of the 1964 Civil Rights Act nor application of constitutional standards to the facts of record is involved at this stage of the litigation, since the Court of Appeals' reference to Title VI was only incidental, and since the Court of Appeals did not pass upon the correctness of the district judge's constitutional ruling. Resolution of the statutory construction question, however, will have a significant impact upon the operation of the ESAA program because of the increased burden which would be placed upon the administrative agency if the statute is held to incorporate constitutional standards.

I

The language, legislative history and administrative interpretation of § 1605(d)(1)(B) all support the construction adopted by the Court of Appeals. The specific conditions of ineligibility contained in § 1605(d)(1) were adopted by the Congress in response to criticism by civil rights organizations of the predecessor Emergency School Assistance Program—including the specific complaint that funds were awarded to districts in which faculty segregation persisted. The clauses of § 1605(d)(1) were in-

tended to prevent repetition of such abuses. Moreover, an amendment requiring a showing of intent was proposed and adopted as a part of clause (A) but not clause (B)—the specific provision of the statute at issue in this case—and the Senate rejected another amendment which would explicitly have adopted constitutional standards by barring the establishment of any additional eligibility criteria for districts operating pursuant to court order. Finally, when ESAA was reauthorized in 1978, Congress was made aware of the statutory interpretation followed by the Department of Health, Education and Welfare and its specific application to Petitioners' school district. Nevertheless, no change in the language of clause (B) was suggested, and an alternative amendment addressed to the faculty segregation-ineligibility issue was passed by the House of Representatives but eliminated by the conference committee. Hence, the Congress has adopted and continued the original agency interpretation of the statute pursuant to which Petitioners' school district was held ineligible for assistance in 1977-78.

II

If the Court does hold that § 1605(d)(1)(B) incorporates constitutional standards requiring a showing of intentional discrimination, it should provide guidance to the lower courts concerning application of those standards to the faculty assignment setting. Specifically, the Court should announce that where a strong *prima facie* showing of discrimination is made out (as here) by statistics demonstrating a high correlation between the student body and faculty racial composition of the schools within a district, it may be overcome only by clear and convincing evidence that faculty were assigned pursuant to a nonracial mechanism which avoided the opportunity for discrimination to affect the process.

ARGUMENT

Introduction

The issue in this case is a very narrow one. Petitioners' applications for ESAA funds for the 1977-78 school year were denied because of HEW's determination that Petitioners were ineligible under 20 U.S.C.S. § 1605(d)(1)(B) (Supp. 1978),[8] and the regulation interpreting that clause. That determination was grounded upon HEW's finding that faculty members within the New York City school system were assigned "in such a manner as to identify . . . schools as intended for students of a particular race, color or national origin," 45 C.F.R. § 185.43(b)(2) (1978).[9] Petitioners contend that the regulation is an incorrect interpretation of § 1605(d)(1)(B) because the Act makes ineligibility depend upon a showing of a constitutional violation.[10] Only the issue of statutory construction (Question No. 1[11]) is appropriately before this Court in the present posture of this case.[12]

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[8] As previously noted, ESAA was reauthorized in the Education Amendments of 1978. The section in question is now codified at 20 U.S.C.S. § 3196(c)(1)(B) (Supp. 1979).

[9] Pursuant to the district court's Order of November 18, 1977 (Pet. App. 30), HEW subsequently reconsidered Petitioners' eligibility under the "constitutional standards" which it set forth, and found there was an unremedied constitutional violation with respect to faculty assignment. That finding was not passed upon by the Court of Appeals. See text *infra*.

[10] Such a showing must be based upon evidence demonstrating intent or purpose to discriminate. *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 189, 198, 206-08 (1973); *Washington* v. *Davis*, 426 U.S. 229, 238-48 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977).

[11] *See* Pet. Br. at 2.

[12] The Court of Appeals has not passed upon the remaining questions framed by Petitioners, nor has it indicated what evidence would be required, in its view, to demonstrate a constitutional viola-

Furthermore, even if constitutional standards should have been engrafted upon § 1605(d)(1)(B), the practical import of failing to do so in the case at hand is doubtful. Petitioners have never denied that the pattern of faculty assignment in their schools was strongly correlated with the pattern of student body racial composition. Instead, they have urged that a variety of explanations be accepted in justification of a situation "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, ..." *Swann* v. *Charlotte-*

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tion with respect to faculty assignment. Rather, the Court of Appeals explicitly declined to review the district court's ruling that there was substantial evidence to sustain HEW's finding of constitutional violations (App. 150). And a careful reading of the Second Circuit's opinion demonstrates that it did not hold that Petitioners had violated Title VI, but only adverted to Title VI in support of its interpretation of the ESAA statutory ineligibility provisions. 584 F.2d at 589. Under these circumstances, until this Court has "the valuable assistance of the Court of Appeals," *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 n.1 (1963), it should not reach the other matters sought to be raised by Petitioners even if it concludes that the Court of Appeals erred in its construction of ESAA. *See, e.g., Davis* v. *Passman*, 47 U.S.L.W. 4643 (June 5, 1979); *Furnco Constr. Corp.* v. *Waters*, 57 L. Ed. 2d 957, 969-70 (1978); *Wise* v. *Lipscomb*, 57 L. Ed. 2d 411, 421-22 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 327 (1975).

For similar reasons, the Court is not called upon in this matter to weigh the factual evidence presented on the administrative record; certainly Petitioners reach well beyond the issues upon which review was granted in seeking a remand with instructions that the district court require "HEW to dispense the withheld ESAA funds to the Board." Pet. Br. at 67. If the Second Circuit's interpretation of the ESAA eligibility standard is correct, then its determination that Petitioners failed to meet that standard is due to be accepted by this Court pursuant to the "two-court rule." *See Berenyi* v. *Immigration Serv.*, 385 U.S. 630 (1967). (Since the district court upheld HEW's finding of ineligibility while applying a stricter standard than the Court of Appeals, its ruling under the Second Circuit's test of eligibility is *a fortiori* the same.) Even if the Second Circuit and the district court erred, this Court should clarify the legal standard but remand for its appropriate application by the trial judge in the first instance.

Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971). And they adhere to this position despite the existence in the record (usually not available to this Court at the time review is granted) of admissions that at least some of their "explanations" have an explicitly racial basis.[13]

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[13] For example, one of Petitioners' "explanations" is the operation of the 1969 New York School Decentralization Law, which permitted certain community school districts to bypass the Board of Examiners' rank-ordered listings of applicants for teaching positions. This procedure resulted in the accelerated hiring of minority applicants in those community districts. Petitioners allege an explicitly racial basis for this feature of the Decentralization Law. The purposes of the law were, according to the *Verified Complaint*, to ". . . (2) increase the number of minority teachers employed in the New York public School system," *but* not on a system-wide basis. Rather,

> [r]evisions of the New York Education Law were based on these factors: (a) City public school student population had dramatically changed from predominantly non-minority to predominantly minority . . . (c) low reading achievement, particularly among minority students, fostered a developing educational consensus that *minority teacher role-model theories* should be explored, at least experimentally, in schools where low reading levels warrant new educational approaches:

Verified Complaint, ¶ 27B, Ct. App. App. at 11-12; *Amended Verified Complaint*, ¶ 27B, Ct. App. App. at 515-16 (emphasis supplied).

Or, as more forthrightly described in a letter to the city school system's Deputy Chancellor describing the basis for the 1969 enactment, which is quoted approvingly in the Complaint,

> . . . A political compromise was reached whereby heavily minority schools—correlated with schools below the 45th percentile in reading scores—might hire teachers [in a way] . . . which, it was felt, would enlarge the pool of minority candidates and thereby increase the percentage of minority teachers. Schools whose reading scores were above the 45th percentile were required to hire from the rank order lists.

Verified Complaint, ¶ 16, Ct. App. App. at 39. *See also*, Ct. App. App. 209-11 (District Court Order of November 18, 1977). In other words, by deliberate structuring of the law, it became permissible to hire additional minority teachers, but only if they were restricted to areas of the system in which minority pupils predominated. Indeed, the chief executive officer of the New York City school system stated that any attempt to match the ratio of minority teachers assigned to schools serving the "overwhelmingly minority student concentra-

These admissions in Petitioners' own pleadings make it apparent that there is but a tenuous possibility that Petitioners could have been found eligible for ESAA funds in 1977-78, whatever legal standards were applied. Rather than give full consideration to the case, therefore, the Court may wish to dismiss the writ as improvidently granted.

As we suggested in the Statement of Interest, *supra*, a decision sustaining Petitioners' interpretation of ESAA would seriously inhibit progress which has been made as a result of enforcing the eligibility conditions for assistance under the Act. The Director of the Office for Civil Rights, HEW, testified in 1977 that

> [i]t is our judgment that the pre-grant conditions of the kind contained in the ESAA statute are among the most effective ways of enforcing nondiscrimination provisions of law and ensuring equal opportunities for the beneficiaries and potential beneficiaries of Federal financial assistance.[14]

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tion in Manhattan" to the systemwide faculty ratio was "educationally pointless." *Anker affidavit*, App. 93-94.

[14] He preceded the statement quoted in text by summarizing the Office's experience with the ESAA program as follows:

> In requiring compliance with specific civil rights provisions as a precondition to the award of Federal financial assistance, the ESAA program has had a significant role in the prevention and elimination of unlawful discrimination. In each of the funding cycles subsequent to the enactment of the statute, significant numbers of students have been reassigned from racially identifiable classes (including racially isolated classes) and racially identifiable special education programs determined to be educationally unjustified. A number of comprehensive plans have been adopted to provide equal services to national origin minority children. Several thousand teachers have been reassigned to eliminate racially identifiable school staffs and a number of affirmative action employment programs have been adopted where disproportionate demotions or dismissals of

For example, during Fiscal Year 1976, 23 applicants for ESAA funding were initially declared ineligible because of teacher assignment problems; four determinations of ineligibility based on applications processed for Fiscal Year 1977 as of June 8, 1977 related to faculty assignment.[15] Most of the districts were able to take swift corrective action and obtain waivers of ineligibility.[16]

This effective catalyst for change will be jeopardized, we repeat, by the ruling sought by Petitioners, because the level of detail and the amount of information which the Office for Civil Rights would have to amass in order to support a finding not only that racially identifiable faculties exist, but that their existence stems from "intentional discrimination," would make impossible rapid, pre-grant eligibility clearances. This Court has often remarked on the fact that "[f]indings as to the motivations of multimembered public bodies are of necessity difficult," *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 414 (1977). It is one thing to require such findings of a

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minority faculty took place during the desegregation of school systems.

Part 4: Emergency School Aid Act, Hearings on H.R. 15 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 31-32 (1977).

[15] *Id.* at 29-31.

[16] *Id.* at 54:

> Mr. JENNINGS. With your first point, don't you think, even though the numbers which ultimately don't qualify seem to be small, just the existence of these provisions in the law causes school administrators to become discouraged from approaching for pre-integration types of activities. Therefore, the existence of these things probably scares people away.
>
> Mr. TATEL. I don't know. What I see there are 800 applications that seem to me to be a lot. When I look at the fact that virtually all the districts we find ineligible virtually always obtain eligibility [that] would lead me to believe they can surmount these problems.

court granting a judgment in constitutional litigation, or of an agency proposing to terminate *all* Federal financial assistance because of a violation of Title VI of the 1964 Civil Rights Act.[17] It is quite another, we suggest, to require similar findings by an agency passing upon an application for funds under one specific program, and seeking to apply criteria developed to implement conditions of eligibility contained in that program statute. Only if there are compelling indications in the legislative language or history that this was the Congressional intention should such a result obtain.

I. § 1605(d)(1)(B) WAS INTENDED TO MAKE INELIGIBLE FOR ASSISTANCE THOSE DISTRICTS IN WHICH SCHOOLS ARE RACIALLY IDENTIFIABLE BY VIRTUE OF A PATTERN OF MINORITY FACULTY ASSIGNMENT WHICH CORRESPONDS TO THE PATTERN OF MINORITY STUDENT ENROLLMENT

The Emergency School Aid Act of 1972, at 20 U.S.C.S. § 1605(d)(1)(B) (Supp. 1978) requires, as a condition of eligibility for receiving funds, that an applicant school district not have

> had in effect [after June 23, 1972] any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, *or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency* (or other personnel for whom the agency has any administrative responsibility) [.]

[17] *See* note 7, *supra*.

The Act is administered by the Department of Health, Education and Welfare (HEW), which has adopted regulations to carry out the statutory objectives. The provision of the regulations which is pertinent to the above-quoted section of the law is 45 C.F.R. § 185.43(b)(2)(1978):

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or any other personnel for which such agency has any administrative responsibility), *including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin.*

Succinctly put, the question before this Court is whether the italicized portion of the regulation and its application to this case by HEW "constitute an unauthorized extension of the [eligibility requirements] imposed by [the italicized language of the] statute," *Davis* v. *Southeastern Community College*, 47 U.S.L.W. 4689, 4692 (June 11, 1979).

We demonstrate below that (a) the regulation is not inconsistent with the statute; (b) the legislative history of the provision, and of the ESAA as a whole, fully supports the HEW interpretation; and (c) Congress accepted and adopted HEW's interpretation when it reauthorized ESAA in 1978 without any change in clause (B).

A. The Statutory Language

Clause (B) of § 1605(d)(1) contains two phrases, connected by the disjunctive "or." The phrases are not independent of one another, however, because of the use of the term "otherwise" in the clause. The logical construction of the clause is that the first phrase is considered to be one example of the more general category described in the second; just as one would construe the similarly constructed clause, "bought apples, *or otherwise* purchased fruit" to indicate that the author considered apples to be one sort of fruit. While this exposition of syntax may seem tedious, it is of considerable significance to Petitioners' case. For if the first phrase permits, in Petitioners' characterization, a "disparate impact" test of eligibility, then it is far from evident as a matter of simple grammatical usage that such a test of eligibility under the phrase following the words "or otherwise" is impermissible.

Complete separation in meaning of the two phrases in clause (B) is a critical step in Petitioners' argument. Only if the meaning of the words "engaged in discrimination" is to be determined independently of the first phrase can it be asserted that Congress had no specific practices in mind when it used these words, but rather intended to adopt only constitutional standards of discrimination. Our review of the language and the legislative history, on the other hand, suggests that the first phrase is exemplary of the second, and that Congress intended in the more general language of the second phrase to cover other specific practices, including faculty assignment patterns which caused schools to be racially identifiable.

Petitioners rely heavily upon the use of the word "*presumes*" at p. 41 of the Senate Report on one of the proposed ESAA bills (Pet. Br. at 25-26). This indicates, they say, that "the Senate Committee in considering section 1605(d)(1)(B) made a *significant and conscious distinction* between the language of the section which relates to 'demotion or dismissal' and that which relates to 'hiring, promotion or assignment'" (*id.* at 26) (emphasis added). We cannot agree. As we suggested above, this construction does violence to the grammar of the clause. In addition, the same Senate Report also contains language consistent with the view that the first phrase of clause (B) is exemplary, and that what Petitioners call a "disparate impact" test applies to the entire set of ineligibilities. The Report states:

> . . . For the purposes of this bill, disproportionate demotion or dismissal of instructional or other personnel is considered discriminatory and constitutes *per se* a violation of this provision, when it occurs in conjunction with desegregation, the establishment of an integrated school, or reducing, eliminating or preventing minority group isolation.[18]

Had Congress intended to make a sharp distinction in meaning between the two phrases, it would not have described disproportionate minority staff reduction as "*per se*" a violation of "this provision." Furthermore, just prior to the language quoted by Petitioners, the Senate Report declares:

> The language used in that part of paragraph (1) which precedes clause (A) is designed to render local educational agencies ineligible if they cause to occur, *or permit to exist*, those activities described in clauses (A), (B), (C), or (D). . . .[19]

This description of the statutory ineligibility section simply cannot be squared with Petitioners' arguments

[18] S. REP. No. 92-61, 92d Cong., 1st Sess. 18-19 (1971) [emphasis in original].

[19] *Id.* at 41 [emphasis supplied].

that disqualification on any ground except disproportionate minority staff reduction requires a showing of intentional conduct. The more sensible reading of the language of clause (B), and of the entire Senate Report, is that Congress sought to delineate minimum standards of desegregation-related conduct for ESAA recipient eligibility. Since the legislative history indicates that included among the specific conduct which the Congress sought to prevent was the maintenance of faculty assignments resulting in racially identifiable schools, the language of the clause is no bar to an HEW regulation which gives effect to this intention.

B. The Legislative History

The course of ESAA was extraordinarily tortuous. First proposed by the President in 1970, it was passed in different versions on several occasions by each House of Congress before ultimate enactment in 1972. Petitioners' discussion of the legislative background (Br. at 19-40) barely plumbs the surface of this process, and omits entirely consideration of the earliest legislative efforts, which settled some of the basic issues carried forward in later versions of the bills. In order to present the history of the statute as a whole, and to assist the Court in tracing the background, we describe it in some detail.

1. *Spring and Summer, 1970*

The concept of ESAA emerged on March 24, 1970, when the President of the United States issued a statement discussing school desegregation and busing, and outlining the policies which the national administration would follow. Although President Nixon had strong personal reservations about busing, he favored faculty integration.[20] "In order to give substance to these commit-

[20] I have instructed the Attorney General, the Secretary of Health, Education and Welfare, and other appropriate officials of the Government to be guided by these basic principles and policies:

. . .

Segregation of teachers must be eliminated. To this end, each school system in this Nation, North, South, East and West, must move immediately, as the Supreme Court has ruled, toward a goal under which "in each school the ratio of white to Negro faculty members is substantially the same as it is thoughout the system."

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ments," the President said, he would propose legislation to make Federal funds available to school systems which were desegregating.[21]

The President sent his legislation to the Congress on May 21, 1970;[22] shortly thereafter, a bill embodying his program was introduced in the House of Representatives.[23] It did not contain any conditions of eligibility or specific requirement for faculty integration. Two weeks later, in the initial hearings on the proposal, there was skepticism about the administration's motives and concern that most of the funds would go to school districts which had resisted court decrees, without any requirement that meaningful integration occur or that discrimi-

[21] I will ask Congress to divert $500 million from my previous budget requests for other domestic programs for fiscal 1971, to be put instead into programs for improving education in racially impacted areas, North and South, and for assisting school districts in meeting special problems incident to court-ordered desegregation. For fiscal 1972, I have ordered that $1 billion be budgeted for the same purposes.

Id. at 317.

[22] *Id.* at 448, *reprinted in Emergency School Aid Act of 1970, Hearings on H.R. 17846 and Related Bills Before the General Subcommittee on Education of the House Comm. on Education and Education and Labor*, 91st Cong., 2d Sess. 21 (1970) [hereinafter cited as *1970 House Hearings*].

[23] H.R. 17846, 91st Cong., 2d Sess. (1970), *reprinted in 1970 House Hearings* at 2-17.

natory practices be ended.[24] Although the Secretary of HEW indicated that the Department was in the process of preparing program criteria,[25] he and other witnesses were repeatedly asked whether Congress ought not to include restrictions on eligibility within the legislation itself. There was agreement that such limitations should be contained either in the statute or in regulations.[26] Similar testimony was given before the Senate Select Committee on Equal Educational Opportunity,[27] and was considered by the Senate committee to which the President's bill had been referred.[28]

Congress was unable to complete action on the measure in time for the opening of school in the Fall of 1970. Instead, $75 million was made available for an "Emergency School Assistance Program" (ESAP) in the 1971 Office of Education Appropriation Act, P.L. 91-380,[29] which passed both Houses over the President's veto on August 18, 1970. In order to have the program operational when school opened, HEW on August 22, 1970 issued regulations without a prior public comment period. 35 Fed. Reg. 13442 (August 22, 1970).

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[24] *E.g., 1970 House Hearings* at 36-37 (Rep. Hawkins), 64-65 (Rep. Ford).

[25] *1970 House Hearings* at 43.

[26] *E.g., 1970 House Hearings* at 66 (HEW Secretary Finch), 125 (Dr. James S. Coleman), 256 (Prof. Alexander Bickel).

[27] *Equal Educational Opportunity, Hearings before the Senate Select Committee on Equal Educational Opportunity,* 91st Cong., 2d Sess. 992, 1282-83, 1462, 1518, 1528 (1970) [hereinafter cited as *Select Committee Hearings*].

[28] "Senator PELL. The Mondale committee and this subcommittee are working very closely. The material furnished to the Mondale committee will be sifted out and given to us. I wouldn't want to duplicate it." *Emergency School Aid Act of 1970: Hearings on S. 3883 and S. 4167 Before the Subcommittee on Education of the Senate Comm. on Labor and Public Welfare,* 91st Cong., 2d Sess. 121 (1970).

[29] 84 Stat. 800, *reprinted in* [1970] U.S. CODE CONG. & ADM. NEWS 942.

Those initial ESAP regulations, 45 C.F.R. Part 181 (1971), reflected both the President's design and the Congressional concerns which had been expressed during the 1970 hearings and the debates on the appropriations measure.[30] The regulations contained specific eligibility requirements disqualifying school systems which had engaged in the discriminatory practices condemned in the hearings.[31] The regulations also made fully integrated faculty assignments a precondition for assistance.[32]

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[30] The first attempt to establish the program took place when the Senate amended H.R. 17399, 91st Cong., 2d Sess. (1970), the Second Supplemental Appropriation bill, to include a $150 million allocation for an ESAP program. When the bill was debated, Senator Mondale voiced worries "that these funds may be wasted in desegregated schools which: . . . Have discriminatorily fired or demoted black faculty, Or in other ways have abused and circumvented the goal of quality integrated education." 116 CONG. REC. 19930 (June 16, 1970). Accordingly, he proposed three amendments to prevent this result. But all ESAP provisions were stricken from H.R. 17399 in the Senate on a point of order. 116 CONG. REC. 10818 (June 22, 1970). Subsequently, Senator Javits introduced them—incorporating the Mondale amendments—as an amendment to H.R. 16916, 91st Cong., 2d Sess. (1970), the Office of Education Appropriation bill. 116 CONG. REC. 21218 (June 24, 1970). The Javits proposal was added to the bill the next day, *id.* at 21485, and the measure was passed by the Senate, *id.* at 21509 (June 25, 1970). The Conference Committee recommended adoption of the Senate ESAP version with a reduction in funds to $75 million, which was accepted by both Houses. *Id.* at 24581 (July 16, 1970) [House], 26215 (July 28, 1970) [Senate]. Following the President's veto, Congress enacted the measure by the requisite two-thirds majority vote. *Id.* at 28779 (August 13, 1970) [House], 29391 (August 18, 1970) [Senate].

[31] For example, the regulations required an assurance that minority faculty members would not be demoted or dismissed in the desegregation process. 45 C.F.R. § 181.6(a)(4)(v) (1971). *See, e.g., 1970 House Hearings* at 189-90, 205, 676; *Select Committee Hearings* at 939, 945, 1156-59, 1517, 1836-37. The legislation itself barred recipients of aid from transferring property or services to racially discriminatory private schools, and from reducing state and local support to desegregating schools and districts, as a result of Senator Mondale's amendments. *See* note 30 *supra.*

[32] . . . (a) An application of a local educational agency for assistance under the program shall—

The twin themes of avoiding discriminatory practices and assuring that funds were awarded only to systems in which effective desegregation took place continued to be sounded throughout the subsequent Congressional deliberations leading up to eventual adoption of ESAA.

2. *Fall and Winter, 1970*

By the time the Congress returned to its consideration of ESAA, substantially more information about the operation of ESAP, and the need for strengthened civil rights provisions in the legislation, was available. In late 1970, six civil rights organizations released a joint study of ESAP's first funding cycle.[33] Their report was highly critical of the program's administration. Because

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> . . . (4) Contain assurances satisfactory to the Commissioner accompanied by such supportive information as he may require:
>
> > . . . (vi) That the local educational agency will take effective action to ensure the assignment of staff members who work directly with children at a school so that the ratio of minority to nonminority group teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system[.]

45 C.F.R. § 181.6(a)(4)(vi) (1971). § 181.2 of the ESAP regulations stated that the

> purpose of the emergency assistance to be made available under the program described in this part is to meet special needs incident to the elimination of racial segregation and discrimination among students and faculty in elementary and secondary schools by contributing to the costs of new or expanded activities to be carried out by local educational agencies or other agencies, organizations, or institutions and *designed to achieve successful desegregation* and the elimination of all forms of discrimination in the schools on the basis of students or faculty being members of a minority group. [emphasis supplied]

[33] Washington Research Project, et al., THE EMERGENCY SCHOOL ASSISTANCE PROGRAM, AN EVALUATION (1970).

of the desire to distribute funds by the beginning of the fall semester, it charged, money had been practically given away without either an evaluation of contemplated program quality or adequate civil rights protections.[34] These allegations figured prominently in the next round of hearings and debates on the proposed (authorizing) legislation.[35]

A new version of the bill had been introduced in the House of Representatives on September 24, 1970. H.R. 19446, 91st Cong., 2d Sess. (1970) at that time contained no conditions of eligibility similar to those now part of ESAA. However, as knowledge of the ESAP fiasco spread, modifications were made by the subcommittee to which the bill had been referred. *See* H.R. REP. No. 91-1634, 91st Cong., 2d Sess. 8 (1970). When the bill was reported to the floor, Representative Pucinski stated this explicitly.[36] During the debates which preceded passage of the measure on December 21, 1970, 116 CONG. REC. 43145, other members of the House exhibited

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[34] *Id.* at 14-17. *See also*, Washington Research Project, et al., THE STATUS OF SCHOOL DESEGREGATION IN THE SOUTH, 1970 (1970).

[35] *See, e.g., Emergency School Aid, 1971: Hearings on S. 195 Before the Subcommittee on Education of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 110 (1971) [hereinafter cited as *1971 Senate Hearings*]; 116 CONG. REC. 42218, 42223 (Rep. Pucinski), 42222, 42223 (Rep. Hawkins), 42222, 42224, 42230 (Rep. Conyers), 42224, 42231 (Rep. Reid) (December 17, 1970), 43143 (Rep. Ryan) (December 21, 1970).

[36] Mr. PUCINSKI. . . . a task force has made a study of the $75 million and the task force was in many ways critical of the program. That $75 million was put together with paper clips, Scotch tape and chewing gum with no guidelines, no criteria and no specific requirements, covering five different programs. This legislation now pending before us, I ask my colleague from Michigan to carefully review it and he will find that we have carefully written into law the kind of prohibitions and guidelines and standards which will preclude the recurrence of the criticism that was leveled at the first $75 million.

116 CONG. REC. 42218 (December 17, 1970).

familiarity with the substance of the civil rights groups' report.[37] H.R. 19446 (as reported to the floor) responded to these problems by requiring a civil rights assurance covering assignment of faculty.[38] Although, as noted, the

[37] For example:

> Mr. RYAN. . . .
>
> In voting for the Emergency School Aid Act of 1970, therefore, I do so cognizant that the Congress must exercise a stringent oversight function to assure that its provisions are not misused, because the administration's record is dismal. In fact, the very program authorized by this bill has already been abused. In August, $75 million was appropriated for the progenitor of the program authorized by the bill before us today. By virtue of this appropriation, $71.4 million has been distributed. And an evaluation released on November 24 by the same groups which published "The Status of School Desegregation in the South, 1970" reveals the misuse of those funds.
>
> Let me briefly run down the list of defects which the November 24 report, entitled "The Emergency School Assistance Program: An Evaluation," detailed with regard to the administration of the emergency school assistance program, whose promise the report describes as having "been broken."
>
> . . .
>
> Second, making ESAP grants to districts engaged in these discriminatory practices amounts to HEW's acquiescence in fraud perpetrated by local school officials. The ESAP regulations were carefully drafted to require that each applicant guarantee that it would not engage in the practices prohibited by those regulations—among them racial discrimination in the hiring, firing, promotion, and demotion of staff; the racially imbalanced assignment of staff within the school system; . . . .

116 CONG. REC. 43143 (December 21, 1970). *See also* other comments in note 35 *supra*.

[38] Applicants were required to sign an assurance that

> staff members of the applicant who work directly with children, and professional staff of such applicant who are employed on the administrative level, will be hired, assigned, promoted, paid, demoted, dismissed or otherwise treated without regard to their membership in a minority group, except that no assignment pursuant to a court order, plan approved under title VI of the Civil Rights Act of 1964, or a plan determined to be acceptable by the Assistant Attorney General for Civil Rights

bill passed the House of Representatives on December 21, it was never approved by the Senate. Accordingly, new legislation was introduced, and new hearings held, in the 92d Congress.

3. *Spring, 1971*

Ruby G. Martin, a former Director of HEW's Office for Civil Rights and one of the report's authors, testified before both House and Senate subcommittees. In this testimony, the major problems with ESAP were identified; they included faculty segregation:

> We found cases of segregation within schools, classrooms and other facilities; cases of segregation and discrimination in bus transportation; *cases where faculty and staff had not been desegregated in accordance with applicable requirements*; . . . .[39]

As Marian Edelman, another Washington Research Project official, put it, the ESAP regulations were strongly worded but they had not been enforced.[40]

These complaints were met with sympathy and concern by figures who would play major roles in the enactment of the new legislation. For example, during the hearings

> following a notice of complaint pursuant to section 407(a) of such Act will be considered as being in violation of this subsection[.]

§ 8(a)(10), H.R. 19446, 91st Cong., 2d Sess. (1970), *reprinted at* 116 CONG. REC. 42225, 42226 (December 17, 1970).

[39] *Emergency School Aid Act: Hearings on H.R. 2266 Before the General Subcommittee on Education of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 24 (1971) [emphasis supplied] [hereinafter cited as *1971 House Hearings*]; *see also, 1971 Senate Hearings* at 121-70. *And see,* Washington Research Project, et al., THE EMERGENCY SCHOOL ASSISTANCE PROGRAM: AN EVALUATION 50-51 (1970); Washington Research Project, et al. THE STATUS OF SCHOOL DESEGREGATION IN THE SOUTH, 1970 97-100 (1970).

[40] *1971 Senate Hearings* at 143; *1971 House Hearings* at 36.

Senator Mondale asked about the eligibility of a county system in which three all-black schools had faculties 70%, 73% and 100% black while nine majority-white schools had majority-white faculties.[41] On the House side, Representative Pucinski made clear the subcommittee's interest in writing into the legislation adequate safeguards to prevent the violations listed in the report.[42] Both subcommittees were also presented with another study on ESAP, this one prepared by the General Accounting Office, which criticized the lax administration of the program.[43] While GAO studied only a small sample of approved applications, it confirmed that districts in which faculty assignments did not meet the standards of the ESAP regulations nevertheless were granted assistance.[44]

In the spring of 1971, the Senate Committee reported out (and the Senate passed) an ESAA proposal which

[41] *1971 Senate Hearings* at 365.

[42] I might say to the committee that we are very privileged to have before us two very distinguished spokesmen in the cause of better education in this country. Mrs. Ruby Martin, who is here as head of the Washington Research Project Action Council. The Action Council has done substantial work in evaluating the method in which the original $75 million was spent by the administration in schools undergoing desegregation. . . .

It had been our hope when we put together the Emergency School Aid Act of 1970 and worked it through this committee that we could write into the legislation sufficient standards and sufficient safeguards to assure against the very abuses and shortcomings which the witnesses on this occasion and on previous occasions have properly pointed out. . . .

1971 House Hearings at 17, 18.

[43] General Accounting Office, *Need to Improve Policies and Procedures for Approving Grants Under the Emergency School Assistance Program* (1971), *reprinted in 1971 House Hearings* at 89-162; *see also, 1971 Senate Hearings* at 171-74.

[44] *See 1971 House Hearings* at 134; *1971 Senate Hearings* at 174. The Commissioner of Education promised better enforcement of the regulations in districts "where serious faculty assignment problems exist." *1971 Senate Hearings* at 229.

combined features of several bills. S. 1557, 92d Cong., 1st Sess. (1971), the "Emergency School Aid and Quality Integrated Education Act of 1971," had bipartisan support led by Senators Mondale and Javits. It contained the language of current clause (B) and also laid especial stress on faculty integration. In order to qualify for assistance under this proposal, a school system would have been required to establish at least one "stable, quality integrated school" with a faculty which was "representative" either of the community at large or of the system's total faculty if the system was seeking to increase the proportion of minority group members in its employ.[45] According to the committee report, this requirement was based on acceptance of testimony that true integration and equality of educational opportunity demanded "a climate of interracial acceptance" and conditions which were "far easier to achieve if tokenism is not involved, if faculty as well as students are substantially mixed . . . ."[46] The bill's primary sponsor, Senator Mondale, specifically declared that eligibility conditions had been written into the legislation because of the failure to enforce the ESAP regulations, the civil rights groups' study, and the GAO report. 117 CONG. REC. 10759 (April 19, 1971). Its standards, he added, went beyond the Fourteenth Amendment:

> . . . And may I say that this measure is not limited to what might be termed the minimum judicially declared standards for desegregation under the 14th amendment. We go beyond that. This is a measure which bases its conclusions on what children need, on what makes educational sense, and on what the

[45] S. REP. No. 92-61, 92d Cong., 1st Sess. 12 (1971). Ultimately, the Conference Committee which reconciled the House and Senate versions of ESAA limited this requirement to applicants for "pilot program" funds. *See* 38 Fed. Reg. 3451 (February 6, 1973).

[46] S. REP. No. 92-61, 92d Cong., 1st Sess. 13 (1971).

country needs, whether the 14th amendment requires it or not.

There may well be many school districts which have desegregated in a minimum way under some court order, which falls far short of the standard that we think is necessary and that has been proven to be necessary for good, stable, quality integrated education, and this proposal is designed to be of help in that area.

117 CONG. REC. 10762 (April 19, 1971).[47]

Thus, although the bill did not define the term "discrimination" which appeared at several places within it (*see* Pet. Br. 27-29), there is ample indication that its sponsors did not intend merely to replicate constitutional standards.[48] Rather, they desired to have HEW deny

[47] *See also*, 117 CONG. REC. 10764 ("This is an education bill. It goes farther than the minimum constitutional requirement"), 10956 ("I am proud that the proposal is a creative proposal incorporating all the hopeful strategies we have been aware of and it does not stop with any legal remedies, but is bottomed on what is good for the schoolchildren of this country").

[48] This was the holding of *Board of Educ.* v. *HEW*, 396 F. Supp. 203, 230-35 (S.D. Ohio 1975), *rev'd in part on other grounds*, 532 F.2d 1070 (6th Cir. 1976), cited by Petitioners (Br. at 27). In *Adams* v. *Mathews*, Civ. No. 3095-70 (D.D.C., Order of June 14, 1976), the district court held that an HEW determination of ineligibility for ESAA funding created only a "presumption of noncompliance with Title VI" and directed HEW to proceed to investigate and enforce the Civil Rights Act in all such cases. *Bradley* v. *Milliken*, 432 F. Supp. 885, 886-87 (E.D. Mich. 1977), also cited by Petitioners, avoided a binding construction of the statute by leaving the matter to HEW. *See also*, *Bradley* v. *Milliken*, 460 F. Supp. 299, 317 (E.D. Mich. 1978) ("The problem with the present faculty distribution is that schools with a predominance of black students also have a predominantly black faculty, while schools which were traditionally white by student enrollment have a predominantly white faculty"). *Robinson* v. *Vollert*, 411 F. Supp. 461 (S.D. Tex. 1976), discussed at Pet. Br. 42-43, involved a different clause of § 1605(d)(1) and a wholly different question: whether ESAA extends so far beyond the constitutional minimum as to

funding to districts which did not carry out thorough and effective desegregation plans without any of the abuses that characterized the first year of the ESAP program.[49] This history distinguishes the ESAA legislation from Title VI of the 1964 Civil Rights Act, which a majority of this Court in *Regents* v. *Bakke*, *supra*, found was intended *only* to incorporate constitutional standards of "discrimination." *See id.*, 57 L. Ed. 2d at 767-68 (opinion of Powell, J.), 795-800, 801-02 (opinion of Brennan, White, Marshall and Blackmun, JJ.).

4. *The Stennis Amendment*

The Court of Appeals drew support for its interpretation of § 1605(d)(1)(B) from the language of § 1602(a), which was originally added to S. 1557 by the "Stennis amendment" on April 22, 1971,[50] and which was retained in all succeeding versions of the bill. *See* 584 F.2d at 588-89. Petitioners argue that the court below misconstrued the intent of the amendment as it relates to ESAA.[51] They contend that the Stennis amend-

authorize HEW to conclude that a pupil assignment plan approved under the Fourteenth Amendment by a federal district court was nevertheless "discriminatory" under ESAA. The *Robinson* court's negative response to this question was heavily influenced by separation of powers concerns which simply do not arise in this case. *See* 411 F. Supp. at 472-77. Indeed, the *Robinson* court recognized that § 1605(d) did not merely incorporate constitutional standards but "was aimed at specific forms of discrimination that may occur even in perfectly proportioned systems." *Id.* at 477.

[49] S. 1557 was the lineal ancestor of ESAA. *See* S. REP. No. 92-604, 92d Cong., 2d Sess. 2 (1972).

[50] 117 CONG. REC. 11520 (1971).

[51] The Stennis amendment applied (a) to Title VI of the 1964 Civil Rights Act and Section 182 of the Elementary and Secondary Education Amendments of 1966; and (b) to ESAA. *See* Pet. Br. at 33-34 (quoting language). The Conference Committee which drafted the final ESAA wording in 1972 effectively split the amend-

ment was designed only as precatory language, simply descriptive of the

> policy that ESAA funding is available to all segregated school systems attempting (voluntarily or otherwise) to desegregate, notwithstanding whether their segregated conditions were caused by official or non-official factors.

Pet. Br. at 33. On its face, this is a remarkable construction of legislative language which states the national policy to be that all "*guidelines and criteria* established pursuant to this chapter" shall be applied uniformly "in dealing with conditions of segregation by race in the schools . . . without regard to the origin or cause of such segregation." It would have been totally unnecessary to amend the bill for this purpose. Section 5(a)(1)(A) of the bill already made districts eligible whether they planned to "desegregate" or to "reduce racial imbalance." [52] Even without the Stennis amendment, Senator Mondale said, "[t]he legislation before us today establishes a nationwide Federal standard for the elimination of racial isolation and for the establishment of integrated schools wherever such isolation exists." 117 CONG. REC. 10760 (April 19, 1971). *See also, id.* at 10953 (April 20, 1971) (Sen. Javits).

Moreover, Petitioners' construction of § 1602(a) so enervates the provision as to make a rational observer wonder why Senator Stennis sought to have it included in the law at all. A more informed consideration of the legislative history than is given by Petitioners demonstrates the soundness of the Court of Appeals' reading.

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ment's provisions into two distinct sections without any substantive modification. *See* Pet. Br. at 34 n.*. Only the effect of the proviso on ESAA is at issue here.

[52] S. 1557, 92d Cong., 1st Sess. (1971), *reprinted at* 117 CONG. REC. 12020 (April 26, 1971). *See also*, S. REP. No. 92-61, 92d Cong., 1st Sess. 2, 6, 35-37 (1971).

For several years, Senator Stennis had sought not merely to "*encourage*" (Pet. Br. at 36) federal officials to attack northern, so-called *de facto* segregation, but to *require* them to do so. For example, at his initiative, language similar to that of § 1602(b) [53] was included in the Senate bill which became P.L. 91-230.[54] However, the Conference Committee on the latter bill amended the provision by adding an explanation that it required uniform national application of one policy with respect to "de jure" segregation and uniform national application of another policy with respect to "de facto" segregation.[55] This was not what Senator Stennis had in mind, as he sought to make clear in the amendment he proposed to S. 1557.

Insofar as that amendment covered Title VI and Section 182 (*see* note 50 *supra*), Senator Stennis wished to mandate enforcement, and it was this portion of his amendment (and only this portion) which the sponsors of S. 1557 opposed. Senator Mondale feared that

> [a]lthough it can be read to ask for a uniform policy against discrimination in public education—a policy I vigorously support—many will read the amendment to excuse enforcement of title VI against official discrimination, North and South alike, until such time as the courts declare purely adventitious segregation unconstitutional. This would be a tragic result.[56]

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[53] Senator Stennis' amendment to S. 1557 was "identical to the amendment passed by the Senate last year, with the addition of three words which make it apply to this bill." 117 CONG. REC. 11508 (April 22, 1971). *See* text at note 54 *infra*.

[54] 84 Stat. 121, *reprinted in* [1970] U.S. CODE CONG. & ADM. NEWS 133.

[55] *See id.*, § 2, [1970] U.S. CODE CONG. & ADM. NEWS 134, 2939.

[56] 117 CONG. REC. 10760 (April 19, 1971). *See also, id.* at 10764 (Sen. Mondale); *id.* at 11516 (Sen. Javits) (April 22, 1971). It was

This was hardly idle speculation, as illustrated by a colloquy between Senators Ribicoff and Allen a few days before.[57] But whatever the true or feared impact on Title VI, application of the Stennis amendment to ESAA was straightforward. Senator Stennis wanted to be sure that northern districts were actually required to desegregate, under the same guidelines and criteria as southern districts, in order to receive funds.[58] This application of the amendment to the ESAA program was acceptable to

to this argument, over the amendment's effect on Title VI enforcement, that Senator Stennis was responding in his statements quoted in Pet. Br. at 36.

[57] Senator Ribicoff was seeking to amend S. 1557 to add provisions requiring nationwide planning and implementation of desegregation on a metropolitan area basis within a fourteen-year period. Senator Allen asked:

> If the Supreme Court has already ordered desegregation to a far greater extent than would be achieved under the Senator's amendment at the expiration of 14 years, would it not be unfair to require those school districts to maintain that degree of [de]segregation whereas those metropolitan areas where there is no desegregation have the 14-year period to reach a 50-percent balance.

117 CONG. REC. 10945 (April 20, 1971).

[58] Senator Stennis expressed this concern when the ESAP program was sought to be launched in 1970 through an amendment to the Second Supplemental Appropriations bill. *See* note 30 *supra*. He said:

> Mr. President, that was my point. It has never been said definitely by the President or by Congress where this money is going or whether they are going to require these schools to desegregate.
>
> We know what they will require in the South. But the President has never said that he will require them to desegregate in the North. He says it will be used for the benefit of schools in racially impacted areas.

116 CONG. REC. 20809 (June 22, 1970). In 1971, Senator Eastland supported the Stennis amendment in order to assure that eligibility standards would be applied fairly to northern and southern school districts by HEW employees. *See* 117 CONG. REC. 11514 (April 22, 1971).

its sponsors,[59] as Petitioners recognize (Pet. Br. at 39-40). Their contention that it was intended only to clarify that "de facto" districts could apply for funds under ESAA, however, is supported by neither the language nor the history of the Stennis provision.

5. *Fall, 1971*

The House of Representatives failed to act upon an ESAA bill in time for the 1971-72 school year. Anticipating the extension of ESAP, HEW during the summer promulgated revised regulations which relaxed the requirement of individual school assignments reflecting "substantially the same ratio that exists in . . . the system as a whole" [60] to cover only full-time faculty members.[61] Through continuing resolutions, and over some objections from the sponsors of S. 1557, ESAP was extended until October, 1971;[62] however, because no new authorizing legislation was enacted, Congress appropriated no additional funds for the program during Fiscal Year 1972.[63]

[59] In addition to the Javits statement quoted in Pet. Br. at 39, *see* 117 CONG. REC. 11517 (Sen. Javits) (April 22, 1971):

> . . . if this kind of approach were confined to this bill, I would see a great deal of merit in it. That is what we purport to do with this bill. We want this money used to combat all types of segregation, whether de facto—racial isolation—or de jure.

[60] See 45 C.F.R. § 181.6(a)(4)(vi) (1971), note 32 *supra*.

[61] 36 Fed. Reg. 12984 (July 7, 1971) [proposed]; 36 Fed. Reg. 16546 (August 21, 1971) [final], *reprinted at* 45 C.F.R. Part 181 (1972).

[62] H.R.J. Res. 742, 92d Cong., 1st Sess. (1971), P.L. 92-38, 85 Stat. 89, *reprinted in* [1971] U.S. CODE CONG. & ADM. NEWS 98; H.R.J. Res. 829, 92d Cong., 1st Sess. (1971), P.L. 92-71, 85 Stat. 182, *reprinted in* [1971] U.S. CODE CONG. & ADM. NEWS 198. *See* 117 CONG. REC. 22703-04 (Sen. Mondale), 22704-08 (Sen. Javits) (June 29, 1971); *id.* at 30430 (Sen. Javits) (August 6, 1971).

[63] *See* "Office of Education and Related Agencies Appropriations Act, 1972," H.R. 7016, 92d Cong., 1st Sess. (1971), P.L. 92-48, 85

On November 1, 1971, a new ESAA bill was favorably reported out of committee to the House of Representatives.[64] As in the case of the 1970 House bill, H.R. 2266 included specific eligibility conditions, this time in language identical to that of S. 1557.[65] On the same day, Representative Pucinski sought to have the House consider the matter under a suspension of the rules.[66] Most of the debate now concerned the question whether the anti-busing provisions of the bill were acceptable. The motion to suspend the rules failed.[67]

Two days later, while the House was debating H.R. 7248 (a bill to reauthorize the Higher Education Act), Representative Pucinski announced that he would offer the substance of H.R. 2266 as a floor amendment to that legislation.[68] He did so on the following day[69] and after additional debate about the anti-busing provisions, both the amendment[70] and the bill were passed.[71] The text

Stat. 103, *reprinted in* [1971] U.S. CODE CONG. & ADM. NEWS 115; 117 CONG. REC. 9756 (April 6, 1971) [House]; *id.* at 19218 (June 10, 1971) [Senate]; *id.* at 23033 (June 30, 1971) [Conference Report]; S. REP. No. 92-145, 92d Cong., 1st Sess. 7 (1971); "Supplemental Appropriations Act, 1972," H.R. 11955, 92d Cong., 1st Sess. (1971), P.L. 92-184, 85 Stat. 627, *reprinted in* [1971] U.S. CODE CONG. & ADM. NEWS 709.

[64] Representative Pucinski described it as basically the same bill as had passed the House in December, 1970 (*see* pp. 20-23 *supra*). 117 CONG. REC. 38483 (November 1, 1971).

[65] § 5(d)(1), H.R. 2226, 92d Cong., 1st Sess. (1971), *reprinted at* 117 CONG. REC. 38480 (November 1, 1971). This language was retained in all successive versions of the bills. There was no further debate in the House concerning the precursors of § 1605(d)(1). Senate floor action in 1972, however, is relevant. *See* pp. 33-36 *infra*.

[66] 117 CONG. REC. 38479 (November 1, 1971).

[67] *Id.* at 38493.

[68] *Id.* at 39068 (November 3, 1971).

[69] *Id.* at 39323 (November 4, 1971).

[70] *Id.* at 39339.

[71] *Id.* at 39354.

of H.R. 7248, including ESAA, was then substituted as a House amendment for the text of a Senate-passed higher education reauthorization measure, S. 659[72] and that bill was returned to the Senate.[73]

6. *Winter and Spring, 1972*

On February 22, 1972, S. 659, as amended by the House, reached the Senate floor for the first time. On behalf of the Committee on Labor and Public Welfare, Senator Pell moved that the Senate concur in the House amendment to S. 659 with a substitute of its own.[74] This substitute included ESAA, together with the conditions of eligibility which had been included in both S. 1557 and H.R. 2266 in the previous session. During the debates, many anti-busing amendments were offered and considered. In addition, two proposed amendments to ESAA, including one to the eligibility conditions, are relevant to the matters in dispute.

On February 29, 1972, Senator Chiles introduced an amendment to what became clause (A) of § 1605(d)(1), concerning transfer of property to private schools.[75] The amendment added the words "which it knew or reasonably should have known to be," in order to insure that a school system which transferred property without knowledge that the recipient was a segregated private school would not be penalized. Senator Chiles explained:

> [I]t would provide that it has to be knowingly made or made with some kind of intent, because that was the purpose of Congress originally. I think this

[72] *Id.* at 39374.

[73] Thus, the 1971 House bill (H.R. 2266) became, successively, a part of H.R. 7248 and then S. 659, under which number it was ultimately enacted.

[74] 118 CONG. REC. 4974 (February 22, 1972).

[75] *Id.* at 5982 (February 29, 1972).

> would take care of instances where the school board is doing a valuable job in trying to accomplish desegregation but because they sell some property at public auction or through clerical assistance a sale is inadvertently made by the school district, they find they are in danger of losing all funds and have to pay back funds under the program. That is not what Congress intended.[76]

The Chiles amendment was prompted by the experience of Broward County, Florida under the ESAP program. *See* 118 CONG. REC. 5982-84 (February 29, 1972). In Senator Chiles' view, the district had been ruled ineligible for ESAP because of an inadvertent transfer of property to a private school pursuant to language in the appropriation bill which did not include an explicit requirement of intent[77] (even though, in the Senator's opinion, that is what Congress had meant). To avoid a repetition of the problem, Senator Chiles proposed to amend clause (A) to state such a requirement in the legislation. This was acceptable to the bill's sponsors[78] and the amendment was adopted.[79]

Significantly, Broward County had also been ruled ineligible because of imbalanced faculty assignments,[80] but Senator Chiles proposed no similar amendment to clause

[76] *Id.* at 5983.

[77] The language of P.L. 91-380, 84 Stat. 800, *reprinted at* [1970] U.S. CODE CONG. & ADM. NEWS 944-45 was:

> *Provided further*, That no part of the funds contained herein shall be used (a) to assist a local educational agency which engages, or has unlawfully engaged, in the gift, lease or sale of real or personal property or services to a nonpublic elementary or secondary school or school system practicing discrimination on the basis of race, color, or national origin; . . . .

[78] 118 CONG. REC. 5982 (February 29, 1972).

[79] *Id.* at 5992.

[80] *Id.* at 5983.

(B) even though he suggested that the situation resulting in ineligibility had occurred because of practical, nonracial circumstances similar to those described by Petitioners in this case.[81]

The second suggested amendment which is relevant to this case was also proposed by Senator Chiles. It would clearly have established that only constitutional standards were to apply to at least some classes of applicants by providing that school districts subject to court orders would be exempt from any additional eligibility determinations by HEW.[82] Senator Mondale opposed the amendment on the ground that it would, for example, permit transfers to segregated private schools[83] or, in other words, eliminate the statutory conditions of eligibility. Senator Javits summarized the issue as follows:

> The precise issue is: The Senator from Florida says that when we have a court order, whatever the court order says, we do, and then we qualify for the money.
>
> The Senator from Minnesota (Mr. MONDALE), the Senator from Rhode Island (Mr. PELL) and I say that, in addition to complying with the court order, we have got to comply also with some of the elementary precautions, to prevent the trimming of the desegregation process which may be outside the jurisdiction of the court in that case. That is the real issue. We ran into the situation where property was being transferred to freedom academies, and so forth, so we took the precaution of giving the right to administer what will be done with the money to the governmental department in charge, rather than

[81] *Id.* at 5984.

[82] *Id.* at 6269 (March 1, 1972).

[83] *Id.* at 6270.

> automatically saying that if we comply with a court order we get the money.[84]

This Chiles amendment was defeated.[85] The Senate substitute for the House amendment of S. 659 was then passed [86] and sent to a Conference Committee, which made no material changes in the conditions of eligibility. The Conference Committee's report was passed [87] and became P.L. 92-318 (Education Amendments of 1972), 86 Stat. 235, *reprinted in* [1972] U.S. CODE CONG. & ADM. NEWS 278. Title VII of that act is ESAA.

7. *The Pucinski-Esch Colloquy*

The critical legislative history upon which Petitioners seek to rely is an exchange between Representatives Pucinski and Esch on the House floor when Pucinski introduced the contents of H.R. 2266 as an amendment to the higher education bill (*see* p. 32 *supra*). The exchange is set out in Pet. Br. at 30-31. There is no doubt that it conveys Rep. Pucinski's view that ESAA would not authorize use of the *Singleton* rule as an eligibility requirement. We submit, however, that this "isolated expression of . . . [views [88]] neither is inconsistent with [the HEW regulations n]or is there any other indication in the legislative history that any Member of Congress voted in favor of the statute in reliance on an understanding that" it would weaken the conditions of eligi-

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[84] *Id.* at 6271.

[85] *Id.*

[86] *Id.* at 6277.

[87] *Id.* at 18862 (May 24, 1972) [Senate], 20340 (June 8, 1972) [House].

[88] *See also, Regents* v. *Bakke, supra,* 57 L. Ed. 2d at 767 (opinion of Powell, J.) ("isolated statements of various legislators, taken out of context"); *Califano* v. *Westcott,* 47 U.S.L.W. 4817, 4820 (June 25, 1979) (statutory change "escaped virtually unnoticed in the hearings and floor debates").

bility. *Cannon* v. *University of Chicago,* 47 U.S.L.W. 4549, 4559 (May 14, 1979).

In the first place, Representative Pucinski had complained about adoption of the *Singleton* rule as a condition of eligibility for assistance within a month after adoption of the first ESAP regulations in 1970.[89] As Chairman of the subcommittee which considered all ESAA legislation and as principal sponsor of the measures in the House, he could have sought to alter the conditions of eligibility language in the statute in a manner which would have made clear to his colleagues that the ESAP approach was being disapproved. (For example, he could have proposed language similar to that inserted by Senator Chiles in clause (A), *see* p. 33 *supra,* or providing explicitly that assignment of faculty in substantial accordance with the system-wide ratio was not to be required as a condition of eligibility for assistance.) Instead, his statements at the time of major consideration and debates on the House bill (in 1970 and 1971) emphasized his desire to prevent recurrence of the problems identified in the civil rights groups' study of ESAP.[90] *See* notes 36, 42 *supra.* Furthermore, no debate, agreement with or comment followed Representative Pucinski's November 4, 1971 response to Representative Esch. The discussions of the bill which follow reveal preoccupation with anti-busing measures. These facts make it difficult to determine whether the response represented Congressional sentiment or not. At best, the Esch-Pucinski exchange must be viewed as ambiguous.

Finally, the ESAA regulations adopted by HEW were significantly different from the ESAP regulations with respect to faculty assignment. They did not incorporate the *Singleton* rule and, hence, are perfectly consistent

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[89] *See 1970 House Hearings,* at 783.

[90] *See* pp. 21, 24 *supra.*

with even Petitioners' interpretation of the Esch-Pucinski colloquy.

Singleton v. *Jackson Mun. Separate School Dist.*, 419 F.2d 1211, 1218 (5th Cir. 1969), *rev'd in part on other grounds sub nom. Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970), required assignment of teachers to each school "so that the ratio of Negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system." This standard was incorporated in the ESAP regulations.[91] However, the same criterion for eligibility was *not* carried forward in the ESAA regulations proposed on December 2, 1972.[92] Instead, HEW simply required "that full-time classroom teachers be assigned to individual schools so as not to identify any school as intended for students of a particular race, color, or national origin." [93]

The difference between the two guidelines is significant. The *Singleton* standard, as a criterion of eligibility, might require a district in which minority faculty had been randomly assigned to schools to make reassignments so as to insure that variations in faculty racial composition among schools are not "substantial." The ESAA regulations' standard [94] requires reassignment only when the pattern of variations makes schools racially identifiable.

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[91] 45 C.F.R. § 181.6(a)(4)(vi) (1971); 45 C.F.R. § 181.6(a)(4)(vi) (1972).

[92] 37 Fed. Reg. 25746 [proposed]; 38 Fed. Reg. 3452 (February 6, 1973) [final], *reprinted at* 45 C.F.R. § 185.43(b)(2) (1973).

[93] 38 Fed. Reg. 3451 (February 6, 1973) [preamble to final ESAA regulations].

[94] The language of 45 C.F.R. § 185.43(b)(2) as initially adopted in 1972-73 has remained unchanged since that time.

The distinction is explained in HEW's internal manual for its employees who deal with ESAA applications.[95]

The ESAA regulations applied in the instant case, therefore, do not conflict with the Esch-Pucinski colloquy

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[95] Assignment which racially identifies schools.

a. Review available information on the racial composition of the full-time teaching faculty assigned to each of the applicant's schools and the racial composition of the student bodies at those schools. Consider any other information which goes to whether any school is identified as intended for students of a particular race, color, or national origin, such as its pre-desegregation enrollment, its name, its location, or like factors.

b. Determine whether, in the light of the racial composition of its student body and other factors, the racial composition of the faculty assigned to any school confirms the school's racial identification. For example, in a school district with a substantial proportion of both students and faculty from minority groups, a school with twice the relevant districtwide minority student and faculty percentages and no bona fide educational justification for such a heavily minority faculty (e.g., the only teachers qualified for bilingual classes were minorities) would raise serious questions. Bear in mind that the racial composition of the faculty in the applicant's schools as a whole is a given for purposes of this assignment discrimination; what is important is how the existing faculty is assigned among those schools. Thus, a 50 percent black faculty at a school in a LEA with a 5 percent black faculty districtwide would present a much different case than the same faculty in a LEA with a 45 percent black faculty districtwide. Bear in mind, too, that the focus of the inquiry here is whether faculty assignment identifies a school as intended for a particular kind of student. *Thus, where the racial compositions of a school's faculty and student body vary from the appropriate districtwide averages in opposite directions, only the most extraordinary additional facts would support a conclusion of faculty assignment discrimination.*

Office for Civil Rights, HEW, *Handbook for Emergency School Aid Act Programs* 33-34 (1977) (emphasis supplied).

because they do not require mechanical application of the *Singleton* rule.[96, 97]

8. *Summary of Legislative History*

The foregoing analysis of the legislative history of ESAA fairly establishes, we suggest:

—that faculty, as well as student, desegregation was an important goal of ESAA from its inception;

—that addition of the § 1605(d)(1) conditions of ineligibility was directly responsive to the disclosures of ESAP regulation violations in THE EMERGENCY SCHOOL ASSISTANCE PROGRAM: AN EVALUATION, which included segregated faculty assignments;

—that HEW's interpretation of clause (B) of that subsection (to make ineligible for assistance school districts in which faculty members were assigned in racial proportions which matched the student racial distribution among schools) is supported by the Stennis amendment to ESAA, the aim of which was to require that all applicant districts, northern and southern, undertake actual desegregation in order to qualify for funds;

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[96] There is some evidence suggesting that this would meet Representative Pucinski's concerns. *See 1971 House Hearings* at 49 (expressing disapproval of "quota" assignment but acceptance of requirement that faculty be "substantially representative").

[97] The statute provides that an applicant which violated a condition of eligibility after June 23, 1972 could receive assistance pursuant to a "waiver of ineligibilty" if the violation was completely corrected. *Kelsey* v. *Weinberger*, 498 F.2d 701 (D.C. Cir. 1974). The ESAA regulations require, in the case of an applicant which is ineligible under 45 C.F.R. § 185.43(b)(2), that faculty be reassigned to eliminate identifiability and so that the ratio at each school is between 75% and 125% of the district-wide ratio. 45 C.F.R. § 185.44(d)(3) (1978). This remedial standard is not challenged by Petitioners here, who have agreed to much tighter standards to be effective no later than September, 1980. *See* App. 44.

—that during its consideration and passage of ESAA, Congress failed to take any of several opportunities to restrict clause (B) or to confine its scope to constitutional violations; and

—that the current ESAA regulation under clause (B) is not inconsistent with the Esch-Pucinski colloquy upon which Petitioners rely heavily.

Furthermore, the construction of clause (B) to which Petitioners object was issued contemporaneously with the passage of ESAA by the agency to which administration of the program was committed, and has remained consistent and unaltered since that time.

In short, the legislative and administrative history supports fully the Court of Appeals' reading of the statute.

C. Congressional Adoption of the HEW Construction

ESAA was reauthorized in the Education Amendments of 1978.[98] Legislative materials indicate that the attention of the Congress was focused on HEW's interpretation of § 1605(d)(1)(B) by witnesses at hearings who spoke of its application in Los Angeles and New York City. In fact, the House of Representatives' version of the reauthorization bill included a modification of the waiver-of-ineligibility language which was designed to respond to the complaints voiced by these witnesses. However, even that provision was dropped in the Conference Committee Report, which was enacted into law. Thus, the conclusion is inescapable that the Congress has acquiesced in HEW's application of § 185.43(b)(2) of the ESAA regulations.

In 1977 House hearings on the reauthorization, for example, a representative of the Los Angeles United School District complained specifically about application

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[98] § 601 of P.L. 95-561, 92 Stat. 2143, 2252, reprinted in [1978] U.S. CODE CONG. & ADM. NEWS.

of § 185.43(b)(2),[99] and other witnesses were asked about the faculty integration requirement by Congressmen.[100] In the Senate hearings, the President of the American Federation of Teachers cited Chicago, New York, Cleveland, Toledo, Los Angeles "and other AFT cities" in support of his recommendation

> that ESAA be reformed to require a finding of discrimination, not simply a numerical imbalance, before ESAA funds can be cut off.[101]

Senator Javits, who was on the Senate subcommittee, referred specifically to the New York City Title VI agreement requiring reassignment of teachers (App. 44) and asked "what we should do with HEW by way of a change in that situation . . . I will have my staff work with you and we will get Senator Moynihan's staff to do the same." [102]

Ultimately, however, no change was made in the statute. The Senate bill contained no provisions addressed to the problem described by the AFT. The House bill did seek to relax the requirements to obtain a waiver of ineligibility, and the Committee Report cited the Los Angeles testimony explicitly as one justification for the alteration.[103] But the Conference Committee deliberations resulted in dropping even that provision (which

[99] *Part 4: Emergency School Aid Act, Hearings on H.R. 15 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 191 (1977).

[100] *Id.* at 51 (Rep. Quie), 196 (Rep. Perkins).

[101] *Education Amendments of 1977, Hearings on S. 1753 Before the Subcommittee on Education, Arts and Humanities of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 1275 (1977).

[102] *Id.* at 1279.

[103] H.R. REP. No. 95-1137, 95th Cong., 1st Sess. 95-96 (1978), *reprinted in* [1978] U.S. CODE CONG. & ADM. NEWS 5065-66.

modified only the standards for a waiver, not the standards for an initial determination of eligibility).[104] Hence, it is clear that Congress was informed about and carefully considered the application of § 185.43(b)(2) of the ESAA regulations by HEW but decided to impose no modification on the agency. This amounts to Congressional acquiescence in the agency's view of the statute; and even if we were in error in our interpretation of its pre-1978 legislative history, requires that the Court of Appeals' judgment be sustained.

II

II. IF THIS COURT DETERMINES THAT ONLY CONDUCT AMOUNTING TO A CONSTITUTIONAL VIOLATION WILL DISQUALIFY ESAA APPLICANTS UNDER § 1605(d)(1)(B), IT SHOULD RECOGNIZE THE STRONG *PRIMA FACIE* SHOWING OF DISCRIMINATION WHICH IS ESTABLISHED BY THE FACULTY ASSIGNMENT STATISTICS IN THIS CASE AND PUT THE BURDEN ON PETITIONERS TO REBUT THAT SHOWING BY CLEAR AND CONVINCING EVIDENCE

Should this Court disagree with the analysis of the language and legislative history set forth above, and determine that § 1605(d)(1)(B) makes applicants for ESAA funding ineligible only if their conduct (with respect to faculty assignment) rises to the level of a constitutional violation, nevertheless we believe that respondents should prevail in this lawsuit. *See, e.g.*, note 13 *supra* and accompanying text. But as we have argued, it would be inappropriate for this Court to engage in its own review of the administrative record for the purpose of applying the constitutional standard. That should

[104] H.R. CONF. REP. No. 95-1753, 95th Cong., 1st Sess. 286 (1978), *reprinted in* [1978] U.S. CODE CONG. & ADM. NEWS 5189.

be the task of the lower courts on remand.[105] We do believe that it would be desirable for this Court to provide some guidance in this area. Specifically, we suggest that because of the nature of the faculty assignment process, the principles developed in jury discrimination cases should be carried over.

What is at issue is the weight to be accorded statistical evidence when, as in the instant case, such evidence demonstrates an overwhelmingly high correlation or association between schools' minority student enrollment proportions and their faculty minority proportions. Neither the district court,[106] the Court of Appeals [107] nor the Department of HEW [108] takes the position, even under a nonconstitutional test, that such statistics conclusively demonstrate ineligibility. The Department's ESAA manual, for example, instructs employees to take into account any "bona fide educational justification for such a heavily minority faculty (e.g., the only teachers qualified for bilingual classes were minorities) . . . ." [109] What will remain unclear from a simple declaration that § 1605 (d) (1) (B) incorporates constitutional standards are questions about the role of statistics, the burdens of proof and persuasion, etc. These questions may have controlling

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[105] *See* note 12 *supra*.

[106] Pet. App. 104, 106.

[107] *See* 584 F.2d at 589.

[108] *See* note 95 *supra*. Although it appears that the former Associate Commissioner for Equal Educational Opportunities, Dr. Herman Goldberg, initially took a different view of ESAA when he held the first informal hearing on New York City's 1977-78 application, *see* Pet. App. 43-45, that error was corrected by the reconsideration ordered by the district judge, and by the Court of Appeals' approach, *see* 584 F.2d at 589. In any event, the Department's position is now enunciated in its ESAA manual, and we do not understand the government to disagree with this aspect of the Court of Appeals' approach.

[109] *See* note 95 *supra*.

impact upon the agency's workload and may, as a practical matter, determine the eligibility status of applicants in the future. Therefore, if the Court holds that § 1605 § 1605 (d) (1) (B) adopts constitutional standards, we urge that these issues be addressed now rather than being postponed.

The high correlation between a New York City school's minority student enrollment and its minority faculty complement, demonstrated by the statistics in this case, supports an inference that the pattern results from discrimination.[110] This Court's decisions have never explicated the proof required to overcome such a *prima facie* case of unconstitutional faculty assignments.[111] With respect to employee hiring and jury selection, however, two different standards have emerged.[112]

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[110] *See Dayton Bd. of Educ.* v. *Brinkman*, 47 U.S.L.W. 4944, 4946 n.9 (July 2, 1979); *Furnco Const. Corp.* v. *Waters*, *supra*, 57 L. Ed. 2d at 966-67; *Dothard* v. *Rawlinson*, 433 U.S. 321, 328-31 (1977); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 306-08 (1977); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977); *Castaneda* v. *Partida*, 430 U.S. 482, 495-97 (1977); *cf. Washington* v. *Davis*, *supra*, 426 U.S. at 241-42.

[111] In all of the cases touching on the issue, whether the pattern of faculty assignment had been produced by intentional action was not in question. *See United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225, 229 (1969); *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430, 434-35, 442 n.6 (1968); *Bradley* v. *School Bd. of Richmond*, 382 U.S. 103, 105 (1965); *Rogers* v. *Paul*, 382 U.S. 198, 200 (1965); *cf. Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 18.

[112] Although Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, establishes a stricter test of discrimination than the Equal Protection Clause, *see Washington* v. *Davis*, *supra*, 426 U.S. at 247-48, it appears that in cases invloving individualized, rather than systematic, discrimination, the proof required to overcome a plaintiff's *prima facie* showing is the same, whether the claim is statutory or constitutional in nature. *Compare Washington* v. *Davis*, *supra*, 426 U.S. at 246 with *Furnco Constr. Corp.* v. *Waters*, *supra*, 57 L. Ed. 2d at 967-69.

In hiring cases, the *prima facie* case is rebutted once a "justification which is reasonably related to the achievement of some legitimate goal" is articulated as the basis for the hiring decisions. *Furnco Constr. Corp.* v. *Waters*, *supra*, 57 L. Ed. 2d at 968; *Washington* v. *Davis*, *supra*, 426 U.S. at 246.[113] The burden of persuasion then is upon the plaintiff to establish that the purported nonracial justification was merely pretextual. *Furnco*, 57 L. Ed. 2d at 968. In contrast, in the jury cases, this Court has explicitly rejected mere assertions of neutrality in the operation of the selection system as adequate to overcome the *prima facie* case and to shift the burden back to the party claiming that discrimination has occurred. For example, in states which employ the "key man" system of jury selection, the claim that the jury commissioners were not instructed to consider race will not rebut a *prima facie* case of systematic underrepresentation. *Castaneda* v. *Partida*, *supra*, 430 U.S. at 497-99. Nor will mere assertions of nondiscriminatory conduct.[114]

This difference appears to be related to the special susceptibility of the jury selection *process* to abuse, *Castaneda*, 430 U.S. at 497. Whereas in the hiring case the articulation of a nonracial justification shifts the burden back to the plaintiff to establish that the claimed nonracial justification was not the real reason for the hiring decision, in the jury case the burden is upon the state to show that the claimed nonracial justification was in fact the cause for the pattern of underrepresentation.

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[113] ". . . we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, *and the relationship of the test to the training program* negated any inference that the Department discriminated . . ." [emphasis supplied]. *But see International Bhd. of Teamsters* v. *United States*, *supra*, 431 U.S. at 342 n.24 (1977).

[114] *See, e.g.*, cases cited in *Castaneda*, 430 U.S. at 498 n.19.

Castaneda, 430 U.S. at 488 n.8. We believe that cases in which a claim of discriminatory faculty assignment is made are more akin to the jury cases than to the hiring suits, and we urge the Court so to declare. Only clear and convincing evidence of a nonracial mechanism of faculty allocation which avoids the "opportunity for discrimination" [115] should suffice to rebut a *prima facie* showing of discrimination.

Unlike recruitment or hiring, the assignment of a finite systemwide pool of faculty members under contract to a school system is peculiarly within the control of the system. *See, e.g.*, Ct. App. App. at 435 *et seq.* (Chancellor of New York City school system retains ultimate authority to reassign teachers). For this reason, statistics demonstrating a pattern of assignment of black faculty disproportionately to black schools establish a strong basis for an ultimate finding of discrimination.[116] If such a showing may be overcome by the mere assertion that it results from the operation of a combination of factors which are not formally based upon race (*see* Pet. Br. 61-62), without compelling evidence that the process as a whole excludes the "opportunity for discrimination" to take place, then the value of the statistical showing will be completely undermined.[117]

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[115] *Whitus* v. *Georgia*, 385 U.S. 545, 552 (1967).

[116] *Kelly* v. *Guinn*, 456 F.2d 100, 107 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *Morgan* v. *Hennigan*, 379 F. Supp. 410, 456-61 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Davis* v. *School Dist. of Pontiac*, 309 F. Supp. 734, 742-44 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); *cf. Kelley* v. *Metropolitan County Bd. of Educ.*, 317 F. Supp. 980, 991-92 (M.D. Tenn.), *stay order rev'd*, 436 F.2d 856 (6th Cir. 1970); *Mays* v. *Board of Pub. Instruction*, 428 F.2d 809 (5th Cir. 1970).

[117] It can be argued, for example, that it is "nonracial" to leave hiring (and thus assignment) to school principals. Can such a justification realistically be permitted to overcome a statistical

Such an approach throws upon the party claiming discrimination the burden of discovering and recreating the actual workings of the assignment procedure, including the necessity of interviewing and presenting the testimony of all the third parties to whom a school district's responsibility for faculty assignment may be sought to be partially or completely delegated, in order to establish that the statistical patterns are in fact manifestations of improper conduct.[118] Yet not only is the information about actual faculty assignment procedures normally within a district's custody and control;[119] but also it is the non-delegable "obligation of every *school district* . . . to operate now and hereafter only unitary schools." *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19,

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prima facie case? *See Morgan* v. *Hennigan, supra*, 379 F. Supp. at 460; *cf. United States* v. *Greenwood Mun. Separate School Dist.*, 406 F.2d 1086, 1094 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969). The same is true of a scheme in which individual teacher preferences are given effect, even if they are racially motivated (*see* Ct. App. App. 368). *Cf. Mays* v. *Board of Pub. Instruction, supra.*

[118] The implications are particularly serious in the context of this case. The statute unequivocally authorizes HEW to require submission, along with the application for ESAA funds, of information necessary to make the eligibility determination. 20 U.S.C.S. § 1605(d)(5) (Supp. 1978). Currently the agency requires only an assurance of nondiscrimination with respect to faculty assignment, 45 C.F.R. § 185.13(l)(2)(i) (1978); actual distribution of faculty is available through statistical reports required to be filed with HEW or the EEOC. However, if the quantum of proof necessary to find ineligibility is substantially raised, HEW may find it necessary to increase drastically the amount of information which applicants must supply so that it may be in a position to carry out the statutory mandate. Such new paperwork burdens would affect innocent and discriminating applicants alike, but they would be unnecessary if a strong statistical showing put the burden on the individual district to persuade HEW by clear and convincing evidence that its assignment processes were *in fact* truly nonracial.

[119] *See, e.g., International Bhd. of Teamsters* v. *United States, supra*, 431 U.S. at 359 n.45.

20 (1969) (emphasis supplied).[120] *Compare Milliken* v. *Bradley*, 418 U.S. 717, 741-52 (1974).

It seems far more sensible, where faculty assignment is concerned, to hold that a statistical showing of the magnitude made in this case shifts to the school district not only the burden of production, but also the burden of persuasion on the issue of discrimination. *See, e.g., Carey* v. *Piphus*, 435 U.S. 247, 260 (1968); *Mount Healthy School Dist.* v. *Doyle*, 429 U.S. 274, 287 (1977). In order to overcome the statistical *prima facie* case, a school district should be required to establish by clear and convincing evidence that discriminatory purposes played no part in the process of assignment; if the proof is in equipoise, the plaintiff should prevail. This allocation of the burden comports with common sense, for the information about the particulars of faculty assignment will be far more accessible to school authorities than to outside parties or agencies. In addition, in light of the "strong *prima facie* case" showing, *Norris* v. *Alabama*, 294 U.S. 587, 598 (1935), any risk of error should be borne by the school district.

Application of these principles to the case at hand will not be difficult for the lower courts on remand. New York has articulated justifications for the pattern of faculty assignment in the district in 1976. It should bear the burden of producing evidence to substantiate the claim that such justifications were actually operative in the assignment process (*see, e.g.*, Ct. App. App. 325 [distribution of teachers by race among fields of licensure]). Some of its claims were explicitly rejected by

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[120] With this principle in mind, it would appear that the agency's and district court's use of a "foreseeability" standard (*see* Pet. Br. 57-61) was nothing more than a shorthand description for a conclusion that the school district had failed to take steps to assure that discriminatory purposes on the part of any of the multiple actors to whom it had delegated responsibility for faculty assignments would not be given effect.

HEW (*see, e.g.*, Ct. App. App. 507 [majority of qualified bilingual teachers are not Hispanic], 504 [continued predominance of white faculty in predominantly white schools unaffected by change in student racial composition of entire district]). The district court should review HEW's findings based upon the principle that it was Petitioners' burden to back up their claims convincingly, and not just to articulate plausible claims. In the case at hand, this would require the ESAA applicant to demonstrate not only that it administered a formally nonracial mechanism of faculty allocation, but also that the mechanism was not infected by racially based actions of third parties to whom individual decisions were delegated. Unless that burden was carried, HEW's ineligibility determination should be sustained.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

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